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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-817

JUAN JORGE GARCIA CARDENAS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL AND THE SUPREME COURT OF THE STATE OF CALIFORNIA

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

COMES NOW Juan Jorge Garcia Cardenas and respectfully petitions this Honorable Court for a writ of certiorari directed to the Supreme Court of the State of California and to the Court of Appeal of the State of California, Second Appellate District, Division Three to review and reverse the judgment of conviction of petitioner rendered in the Superior

Court of Los Angeles County on August 4, 1969 and the said judgments of the reviewing courts affirming the conviction, and with respect thereto petitioner sets forth as follows:

OPINIONS BELOW

The opinion of the California Court of Appeal was rendered on July 28, 1971, and certified for nonpublication, so it will not be printed and published, but a copy of the opinion is attached marked Appendix "A." A petition for hearing was timely filed in the California Supreme Court, but said court denied the petition on September 22, 1971, without opinion. By reason of the foregoing, the remedy of petitioner in the courts of California has been exhausted and the judgment of conviction is final and not reviewable therein.

JURISDICTION

This Court has jurisdiction to review this case and to entertain the petition for certiorari under Section 1257(3) of Title 28 U.S.C.

STATEMENT OF THE CASE

Federal Questions Raised in California Courts

Petitioner was found guilty on June 25, 1969 after trial by jury, and judgment and sentence were pronounced on August 4, 1969 on five counts of wilful discharge of

explosives at offices, one in Beverly Hills and four in Los Angeles, shortly after midnight on July 19, 1968, in violation of Section 375(4) of the California Penal Code, and five counts of possession of destructive devices at the same times and places, in violation of Section 12303 of the Penal Code, all being felonies. Petitioner was sentenced to state prison.

During the trial, petitioner made motions to suppress evidence illegally seized from his car and home in Miami, Florida, in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, but said motions were denied. Petitioner also objected to the introduction of the illegally seized evidence and of the purported incriminating statement obtained from him by a police officer in violation of his constitutional rights, but his objections were overruled.

The federal questions raised at the hearing on petitioner's motion to suppress the evidence and at the trial were the illegality of the arrest of petitioner, the illegality of the search and seizure of certain documents from his automobile in violation of the Fourth Amendment, the illegality of the search of his home and the seizure of documents in violation of the Fourth Amendment, the obtaining of a purported incriminating statement in violation of the rules laid down by this Court in *Escobedo v. Illinois*, 387 U.S. 478, and *Miranda v. Arizona*, 384 U.S. 436, and the use by the prosecution at the trial of a mass of evidence obtained in violation of petitioner's constitutional rights, which denied petitioner a fair trial and due process of law.

The same contentions were raised by petitioner on

appeal. The Court of Appeal held that the evidence seized from petitioner's automobile and home in Miami was obtained in violation of petitioner's constitutional rights but that the admission of such unlawfully seized evidence was harmless error. It also held that the arrest of petitioner on October 28, 1968 was lawful and that the so-called incriminating statement made by petitioner to a police officer while being transported by plane to Los Angeles and in custody did not violate petitioner's constitutional rights. Substantially the same issues were raised in the petition for hearing in the California Supreme Court, with emphasis on the issue that the constitutional errors were prejudicial and were not harmless errors but were errors of constitutional dimensions.

QUESTIONS PRESENTED FOR REVIEW

Since the California Court of Appeal correctly held that all evidence seized from petitioner's car in Miami, Florida, on April 5, 1968 and all evidence obtained by the search of petitioner's home in Miami on October 28, 1968, including statements made to agents during the search, were obtained in violation of petitioner's constitutional rights under the Fourth Amendment, we are not raising or presenting such issues, but rely on the decision of said Court of Appeal. Therefore, the only issues remaining are as follows:

1. **Was not the failure of the trial court to suppress the evidence and the allowance, over petitioner's objections, of the introduction of the "Florida evidence" unlawfully obtained in violation of the Fourth Amendment to the Constitution prejudicial errors of constitutional dimensions,**

and not harmless errors?

2. Did not the introduction of such evidence over objections of petitioner deny him due process and a fair trial under the Fourth and Fourteenth Amendments to the United States Constitution?

3. Was not the arrest of petitioner in Miami on October 28, 1968, unlawful, being based upon a federal arrest warrant issued on an insufficient complaint—one not having probable cause?

4. Were not the statements made by petitioner to Officer Cline, while he was being transported by plane from Miami to Los Angeles in the custody of said officer, inadmissible both because the statements were tainted by the unlawful arrest and because petitioner had not properly been admonished of his rights under *Escobedo v. Illinois, supra,* and *Miranda v. Arizona, supra*?

5. Was not the evidence against petitioner wholly circumstantial and insufficient to support the judgment of conviction?

STATUTES INVOLVED

Petitioner was convicted and sentenced to the California state prison for violation of California Penal Code Section 375(4), wilfully discharging explosives, and Section 12303, possession of a destructive device. The pertinent portions of these statutes are set forth in Appendix "B."

Also set forth in Appendix "B" are pertinent parts of the following: Section 1538.5 of California Penal Code, Section 1073 of Title 18 U.S.C., and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

BRIEF STATEMENT OF FACTS

The statement of facts is divided into two categories: First, the evidence pertaining to the bombing of five locations in Beverly Hills and Los Angeles, California, in the early morning hours of July 19, 1968, and the evidence purportedly linking petitioner to the offenses, which evidence was entirely circumstantial. This evidence we shall designate as the "California evidence."

Second, the evidence contended to have been unlawfully obtained in violation of petitioner's constitutional rights by unlawful searches and seizures occurring in Miami, Florida. This evidence we shall designate as the "Florida evidence."

California Evidence

The entrance of the Mexican Tourist Council located at 9445 Wilshire Boulevard, Beverly Hills, was bombed about midnight, 12:02 a.m., on July 19, 1968. Shortly after midnight an explosion occurred at the Air France office at 518 West Sixth Street, Los Angeles. The explosion was followed a few minutes later by another explosion at the Japanese Air Lines office just around the corner. Just before 12:05 a.m. an explosion occurred at the Shell Oil

Data Processing Center located at 675 South Westmoreland, Los Angeles, and at apparently the same time an explosion occurred at the Mexican Tourist Department at 3106 Wilshire Boulevard, around the corner from Shell. The explosions occurred just inside the front doors of the locations. Each was caused by homemade bombs. At the Mexican Tourist Council office in Beverly Hills, there was a sticker next to the door which read "Poder Cubano" similar to Exhibit 66. At the Air France office there was a sticker, similar to Exhibit 67, about 10 to 15 feet to the left of the doorway. At the Shell office there was a sticker similar to Exhibit 65. The bombs appeared to have been wrapped in red, white and blue wrapping with Spanish writing on it and to have been placed in the mail boxes of the various locations. Sticker No. 64 was obtained at 540 Wilshire, next door to the explosion at Air France; No. 65 was found 20 or 25 feet from the scene of the explosion at Shell; and No. 67 was obtained from a pole six feet from the explosion at Air France.

It was stipulated that the stickers, Exhibits 64, 65, 66 and 67, were ordered in the quantity of 1,000 on May 25, 1968, from Colby Poster Printing Co., in Los Angeles, by one Pedro Arnau, and were picked up by Arnau and petitioner on June 26th. Petitioner helped Cornillot (codefendant) distribute three or four hundred in Los Angeles, handing out stickers in all places where he met Cubans. A fingerprint expert testified that there were unidentifiable fingerprints on the stickers, plus a fingerprint of Cornillot on the sticker found at the Mexican National Tourist Office (Exhibit 66) and a fingerprint of petitioner on the sticker at the Air France office (Exhibit 67).

Objection as to the testimony of Cornillot's fingerprint was overruled. The expert could not state when the fingerprints were placed on the stickers or for what length of time a fingerprint might have been on an object.

Petitioner took the stand, and, although he testified that he assisted in picking up and distributing stickers and pamphlets, he denied having anything to do with the bombings. He left Los Angeles for Miami before the bombings occurred. He did not hear any talk about the bombings being planned. Hundreds of Cubans live in Los Angeles, and he handed out three or four hundred stickers to Cubans. He left Los Angeles after he had visited his relatives and had helped distribute the stickers and papers, because he had to return to work in Miami. He read of the bombings in the Miami papers.

No one ever saw petitioner near any of the locations or ever heard him make any statement that he was actually involved in the bombings, other than the purported statement to Officer Cline ("What do you think I'll get? . . . We are patriots and we believe in what we are doing. . . . We are fighting on foreign soil just as you are in Vietnam." [Appendix p. 16.]).

Garwin Busa, a prosecution witness, testified that he saw a *woman* with dark hair in a Cadillac near the scene of the explosions at the Shell office on Westmoreland and the Mexican Tourist Department nearby. After the explosions the Cadillac drove off. There was no testimony to indicate that petitioner had anything to do with a Cadillac.

Florida Evidence

Petitioner, a 31-year-old Cuban, had resided in Miami, Florida, with his wife and child since 1961. He also was the owner and operator of a restaurant in Miami. He was anti-Castro and was instrumental in assisting in the distributing of Cuban Power pamphlets and stickers. He came to Los Angeles the first week in June, 1968, to visit relatives and to help in the distribution of Cuban Power pamphlets and stickers, but he left for Miami the latter part of June or the early part of July, 1968, to return to his family and business in Miami. He went by automobile because he was fearful that if he took a plane it might be hijacked to Cuba. In that event he would be jailed, as he had a brother in jail in Cuba.

On April 5, 1968, an officer of the Miami Police Department, Estafan, saw petitioner and his codefendant, Cornillot, standing by petitioner's car taking pictures of police cars as they passed. Estafan arrested them and searched the car, allegedly for creating a disturbance and being drunk. The officer took the car to the police department and, without a warrant, searched the car, finding 60 packages of 1,000 sheets, each containing Cuban pamphlets. Petitioner and Cornillot were released on bail immediately after being taken to the police station. The case against them was dismissed, and all of the pamphlets were allegedly returned to them. However, a number of them were secretly retained by the police and were given to the prosecution for use in petitioner's trial. They were admitted at the jury trial—over objection by defense counsel after a previous motion to suppress had been denied—as People's

Exhibits No. 80 (Declaration of Principles of Cuban Power Cell No. 1), No. 81 (a placard referring to the Cuban Power), and No. 82 (an automobile bumper sticker reading "Poder Cubano"). The California Court of Appeal held that this evidence was erroneously admitted (Appendix p. 10).

After petitioner's return to Miami, the Government, in October 1968, filed a complaint under Section 1073 of Title 18 U.S.C., alleging as a conclusion that petitioner had fled to Miami from Los Angeles to avoid prosecution for the bombings. There was no probable cause for the filing of the complaint, and soon after petitioner was arrested by the federal officers and turned over to California officers the complaint was dismissed. The Government had no evidence to support the complaint, and it was signed and verified by an affiant who had no knowledge of the facts but was signed and verified by him pursuant to directions of his superior.

Armed with a warrant of arrest issued by the United States District Court Commissioner Edward Drew in Los Angeles, under the said complaint filed in said court under the Fugitive Flight Law (18 U.S.C. 1073), federal officers, on October 28, 1968, went to petitioner's apartment in Miami. They arrested petitioner for such charge outside the entrance of the apartment. Without a search warrant the officers entered and searched the entire apartment, finding documents and pamphlets, one of the documents being a draft written in petitioner's handwriting. These documents were introduced in evidence, over defense objections and after the motion to suppress had been denied, as People's Exhibits No. 85 (stickers reading "Poder Cubano"), No. 86 (a handwritten document

entitled "United Cuban Power, Spontaneous Cell No. 1), No. 87 (two receipts for donations), No. 88 (a three-page document entitled "Cuban Power Tribunal of the Cuban Revolutionary Party"), No. 89 (a Bulletin of War), and No. 90 (a document entitled "Cuban Power Cell No. 1").

During the search of petitioner's home, the government agents, without giving petitioner the *Escobedo* or *Miranda* admonitions, elicited from petitioner the admission that the handwritten document (Exhibit 86) was in his handwriting.

The California Court of Appeal, in its opinion (Appendix pp. 11-14), held that the search of petitioner's home was unreasonable and unlawful, that the documentary evidence obtained from his home and the statements made by petitioner to the agents were unlawfully obtained and should have been suppressed and not admitted into evidence.

Officer Cline of the Los Angeles Police Department took custody of petitioner in the Miami jail, where he had been placed by the federal agents following his arrest at his home. Cline then escorted petitioner, in custody, on a plane to Los Angeles. Although on the plane Cline had not advised petitioner of his constitutional rights under the *Escobedo* and *Miranda* rules, Cline was permitted to testify, over petitioner's objection, that in response to certain references by Cline to the revolutionary activities of a Dr. Bosch, petitioner stated, "We are patriots and believe in what we are doing. . . . We are fighting on foreign soil just as you are in Vietnam." Cline told petitioner that Dr. Bosch had received from five to ten years for terroristic activities. Petitioner then said, "Yes, what do you think I'll get?"

These statements were introduced by the prosecution as being admissions or confessions of guilt. However, petitioner testified that he meant only that he was fighting on foreign soil by doing propaganda against the communists.

ARGUMENT

I

The Failure Of The Trial Court To Suppress The Evidence And The Introduction, Over Petitioner's Objections, Of The Evidence Unlawfully Seized From The Petitioner's Car And From His Home In Miami By The Unlawful Searches Thereof, In Violation Of The Fourth Amendment, Were Prejudicial And Constituted Errors Of Constitutional Dimensions, And, Hence, They Were Not Harmless Errors.

The California Court of Appeal, in its opinion, correctly held that the evidence, consisting of Cuban Power pamphlets and stickers, seized from petitioner's automobile in Miami on April 5, 1968 was unlawfully obtained in violation of petitioner's constitutional rights under the Fourth Amendment. It also correctly ruled that the pamphlets and other documentary evidence seized by a search of petitioner's apartment in Miami by government agents on October 28, 1968 were unlawfully obtained in violation of petitioner's constitutional rights under the Fourth Amendment. Its ruling also extended to statements obtained by the agents from petitioner during the unlawful search, pertaining to his having written one of the documents

found therein (Exhibit 86) (portions of said prejudicial document [Exhibit 86] are set forth in a footnote to the court's opinion [Appendix p. 5], as well as portions of Exhibits 89 and 90 [Appendix pp. 5, 6]).

The Court of Appeal, after declaring that such evidence was unlawfully obtained and should have been suppressed in accordance with petitioner's motion to suppress under Section 1538.5 of the California Penal Code and that such evidence should not have been admitted against petitioner over his objection at the trial, nevertheless committed errors of constitutional proportions in holding that such errors were harmless.

In making such ruling, the Court of Appeal arrogated to itself the function of the jury and disregarded the wholly circumstantial character of the California evidence, the inflammatory and prejudicial character of the illegal Florida evidence, and the emphasis placed on the latter by the prosecution in various ways:

First, the district attorney, at considerable public expense, brought witnesses from Florida to testify as to such evidence.

Second, the district attorney fought vigorously and successfully to resist the motion of petitioner to suppress such evidence.

Third, the district attorney sought and succeeded, despite objection and great opposition by defense counsel, to have said evidence admitted and presented to the jury.

Fourth, the district attorney read, during the trial, to the jury and into the record the handwritten document seized from petitioner's apartment.

Fifth, the district attorney relied heavily on the Florida

evidence in cross-examining petitioner, basing a substantial portion of his cross-examination on said evidence (Rep. Tr. 527-579). One-half of the pages recording the cross-examination indicate questions directed to said evidence, i.e., the following pages of the Reporter's Transcript: 527-533, 534-542, 544-547, 554, 562-565, 566-571, 573-579.

Sixth, the district attorney stressed the significance of the Florida evidence in his argument to the jury in his effort to obtain petitioner's conviction.

Finally, the deputy attorney general, in respondent's brief on appeal to the California Court of Appeal, recognized the importance of the Florida evidence seized from petitioner's Miami apartment. Respondent contended that the evidence taken from petitioner's automobile in Florida was not prejudicial; but there was no such contention made respecting the evidence seized from the apartment, thereby impliedly admitting the prejudicial character of the latter. On the contrary, respondent conceded that such evidence "was introduced to show [petitioner] conspired to commit the crimes charged in the indictment" (Respondent's Brief p. 63), and that "[e]ven if such evidence was prejudicial and inflammatory, as [petitioner] maintains, it was highly relevant and therefore was properly admitted into evidence" (Respondent's Brief p. 64).

In view of the importance placed on the Florida evidence by the State of California as a means of convicting petitioner, the lack of any other evidence except uncertain, circumstantial California evidence, it is obvious that the decision of the California Court of Appeal that the error was harmless is without support or foundation and is grossly erroneous.

The effect of the Florida evidence on the trial issue, connecting petitioner as a responsible party in the bombings which occurred in the instant case, cannot be realistically ignored. Certainly, the district attorney recognized the value if not the need of such evidence, inasmuch as he arranged—at obvious expense and considerable effort—for its cross-country production. Evidence that is unimportant and of minimal worth is not brought, together with the requisite witnesses to present it, across state lines to be offered; nor is such evidence the subject of strenuous argument to support its introduction over defense objection unless prosecution value is recognized in the evidence. And, evidence of little value is not utilized as the main base of cross-examination or stressed in argument. Yet, all of the foregoing occurred in the instant case.

The thrust of the Florida evidence, as is manifest from its content, was to establish beyond doubt in the jury's mind the petitioner's deep and militant involvement in the "Cuban Power" movement. Although this evidence was verbal and documentary, it directly corresponded to the extremist activity in Los Angeles which was the subject of the case and, thus, strongly confirmed petitioner's connection with that activity. Based on this evidence, petitioner's testimony of his limited activity in Los Angeles was discredited and his otherwise ambivalent statements during extradition flight assumed an ominous and inculpatory character.

The district attorney also stressed the significance of the Florida evidence in argument to the jury. In effect what the prosecution deemed important for purposes of cross-examination was treated with like emphasis and repeatedly impressed on the jury in argument. The intent

thereby was to convince the jury that petitioner was more than one who merely assisted in the distribution of propaganda but, rather, was a man directly and predominantly associated with the "Cuban Power" movement, who espoused and advocated the use of all means to attain the goal of a liberated Cuba, and who was therefore inclupated in the Los Angeles bombings. The extent of the prosecution's efforts, and its reliance on the illegally seized evidence in this regard, certainly suggests a strong likelihood of success in the endeavor to persuade the jury of the foregoing. At a minimum, such effort and reliance cannot be entirely discounted as affecting the jury's verdict of guilty.

We have also pointed out that the respondent, in its brief on appeal, recognized especially the weight, importance, and significance of the evidence seized from petitioner's apartment, because, although respondent therein contended that the evidence obtained from petitioner's car was not harmful or prejudicial, it made no such contention with respect to the evidence obtained from petitioner's apartment. Respondent conceded that such evidence was introduced to show that petitioner conspired to commit the crimes charged and that "[e]ven if such evidence was prejudicial and inflammatory . . . it was *highly* relevant and therefore was properly admitted into evidence" (Respondent's Brief p. 64). If such evidence was "highly relevant," then it must have had great importance to the prosecution in influencing the jury to return a guilty verdict.

The importance and stress placed by respondent on the Florida evidence is clearly illustrated further in the

respondent's brief on appeal, in its argument on pages 74-78, as follows:

> "The record shows that appellant conspired with others to commit the offenses for which he was indicted and, thus, his conviction as a principal was proper. See Penal Code Section 31. Appellant was aware that the Cuban Power movement, an organization in which he had been a member almost from its inception, had claimed that it had placed some bombs in Miami before July 1968. (Rep. Tr. pp. 526-28, 565, 571-572.) With this knowledge he wrote Exhibit 86, entitled 'To the Public Opinion in General and to the Cuban Exile in Particular.' (Rep. Tr. 566) This document in pertinent part stated:
>
> " ' "Through this medium we inform the exiles in general, that all secret spontaneous cells that operate in different cities of the U.S. close ranks in this spontaneous movement, not to criticize any medium used in the battle for the prompt overthrow of the existing regime in Cuba.
>
> " ' " . . . .
>
> " ' "And that's why we say that we will maintain our position in any place where we may be, attacking the enemies of our country that trade with the blood and sorrow of our Cuba. . . .
>
> " ' "We are nobodys here in exile to be criticizing or trying to judge no one for what he does.
>
> " ' "If we want to criticize or judge, we should first fight to free our country, . . . and then after, judge others." ' " (Cited by respondent is Rep. Tr.

pp. 591, 592, 593, 594.)

And continuing:

> "Appellant testified that he 'made up' the contents of Exhibit 86 and believed in the things he had written (Rep. Tr. 538). When he wrote ' . . . "attacking the enemies of our country that trade with the blood and sorrow of our Cuba," . . . ' he was referring to countries that traded with Cuba such as France, Mexico and Japan. (Rep. Tr. pp. 539-40).
>
> "In another document marked Exhibit 89 and entitled 'Boletin de Guerra' (translated 'War Bulletin'), which appellant testified he wrote in September or October of 1968, it is stated, ' "We are responsible of the revolutionary punishment against the French offices, and we ask the French Government to break its treacherous commerce with the Castro communism." ' (Rep. Tr. p. 541) After his arrest and during his conversation with Sergeant Cline on the airplane, appellant stated, ' "We are patriots and believe what we are doing." ' When the sergeant replied, 'we are all against Communism and that if he wished to fight Castro he should do so in Cuba,' appellant stated ' "We are fighting on a foreign soil just as you are in Vietnam." ' (Rep. Tr. p. 472) Documents addressed to laymen are to be given common sense and not legalistic interpretations. Such documents should be viewed for their own clues as to what their subscribers intended the words to mean. *United States v. Spock, supra*, 416 F.2d 165 at 176.

"In *Scales v. United States* (1959), 367 U.S. 203, 228, 6 L.Ed. 782, the court in distinguishing mere membership in an organization from a conspiracy held:

> "' . . . A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.'

The court went on to hold that the Smith Act:

> "' . . . reach[es] only "active members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action."'

The documents marked Exhibit 86 and 89 and appellant's statements to Sergeant Cline clearly indicate that appellant was a conspirator rather than a mere knowing member of the Cuban Power movement. The documents show that appellant considered Japan, Mexico, France and other countries that traded with Cuba to be enemies that should be attacked and that he and others of the Cuban Power movement were responsible for the bombing of the French Airlines office in Los Angeles. That appellant was referring to

> terroristic activities such as bombings in these documents is clearly shown by his comparison of the movement's activities in the United States with the United States' military activities in Vietnam. Such advocacy and claims of responsibility, in light of the movement's previous bombings in Miami, clearly indicate that appellant conspired to bomb the five offices located in Los Angeles." (Respondent's Brief pp. 74-78.)

The bald conclusion of the Court of Appeal that the admission of the Florida evidence did not contribute to the verdict obtained, that it was not reasonably probable that a different result more favorable to petitioner would have been reached in the absence of the errors; that these errors were not prejudicial, that they did not result in a miscarriage of justice, and that they did not deprive petitioner of a fair trial, were baseless, unfounded and directly contrary to the decisions of the United States Supreme Court, including the case of *Chapman v. California*, 386 U.S. 18, cited by the Court of Appeal. The court's reliance on *Chapman* was wholly misplaced. In *Chapman*, the Court reversed the conviction because the prosecutor had commented on the failure of defendants to take the stand and deny or explain the evidence. The Court stated that this was not harmless error.

The law in the instant case is clear that the errors of the trial court were of constitutional dimensions and not harmless errors as indicated in *Chapman, supra*, and the cases of *Fahy v. Connecticut*, 375 U.S. 85, and *Duncan v. Louisiana*, 391 U.S. 145.

In essence such cases declare that where an error of

federal constitutional character has occurred, before such error can be held harmless, the court on review must be able to declare a belief that the error was harmless beyond a reasonable doubt. In this respect a heavy burden is placed on the beneficiary of the constitutional error to show that the error could not possibly have contributed to the verdicts returned.

Such burden, of course, has not been satisfied by the prosecution in the case at bar. Rather, as discussed above, the prosecution relied heavily on the tainted Florida evidence at trial and argued its weight and significance on appeal. Absent such evidence, like verdicts of guilt may have resulted, but that, according to *Fahy* and *Chapman*, is not the test of prejudice in constitutional error. The concern in this regard is not whether there was sufficient other evidence to support a conviction; it is whether there is a reasonable possibility that the tainted evidence may have contributed to the conviction. It would appear, from what has been presented in the preceding sections of this petition, that at a minimum such reasonable possibility is present in this case. It is indeed submitted that the tainted Florida evidence was a major contributing factor to the verdicts of guilt returned herein.

In *Fahy*, the Court, at page 86, stated:

> "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned with whether there was sufficient evidence on which the petitioner could have been convicted without the

> evidence complained of. The question is whether there is a reasonable possibility that the evidence might have contributed to the conviction."

The Court further stated at page 91:

> "As the Court has noted in the past: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before this Court, but that it shall not be used at all.' "

Citing: *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392; *Nardone v. United States*, 308 U.S. 338; *Wong Sun v. United States*, 371 U.S. 471.

In *Chapman*, the Court adopted the "reasonable possibility" rule as quoted above in *Fahy*.

In *Duncan v. Louisiana*, 391 U.S. 145, the Court reversed the conviction because the unconstitutional error was the denial of a jury trial to petitioner where the offense was punishable by up to two years in jail and the evidence was obtained by an illegal search and seizure. The Court there stated that the Fourteenth Amendment protects rights of a person to be free from unreasonable searches and seizures and to have excluded from criminal trial any evidence illegally seized (citing *Mapp v. Ohio*, 376 U.S. 643).

In *Harrington v. California*, 395 U.S. 251, the Court affirmed the conviction, because the evidence was so overwhelming, and based its decision on the record. The Court stated, at page 255, as follows:

> "We admonished in *Chapman*, 386 U.S. at 23, against giving too much emphasis to 'overwhelming evidence' of guilt, stating that constitutional errors affecting the substantial rights of the

aggrieved party could not be considered to be harmless. By that test we cannot impute reversible weight to the two confessions.

"We do not depart from *Chapman*; nor do we dilute it by reference. We affirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed."

It is to be noted that in *Harrington* the Court specifically stated that the case against Harrington "was not woven from circumstantial evidence," implying that if the conviction had been based on circumstantial evidence, the Court would have reversed. In the instant case, the conviction of petitioner was wholly based on circumstantial evidence, and the Florida evidence was essential and indispensible to the prosecution to obtain conviction.

In this connection reference to the decision of the California Supreme Court in *People v. Cruz*, 61 Cal.2d 861, 40 Cal.Rptr. 841 (1964), appears appropriate. In *Cruz*, as in the present case, evidence was declared inadmissible on appeal because it was the product of a warrantless search which exceeded the scope of a valid arrest. The California attorney general, however, contended that the tainted evidence occasioned no prejudice to the defendant, whose conviction could be supported on the basis of other

narcotic contraband found during a valid search. (In the instant case, as noted, the attorney general fully acknowledges prejudice.) The court, however, pointed out in *Cruz* that throughout the examination of the witnesses and in the argument to the jury, at trial, the prosecution laid preponderant emphasis on the importance of the excluded evidence. The court therefore concluded:

> "There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor—and so presumably the jury—treated it." (40 Cal.Rptr. at 485.)

A like conclusion, it is urged, should obtain in the present case, for, here, preponderant emphasis was placed on tainted evidence by the prosecution—both at trial and on appeal. Moreover, the decision in *Cruz* appears to be predicated on pre-*Fahy* standards for determining prejudicial error. The California Supreme Court held that it was "reasonably probable a result more favorable to the defendant would have been reached if the subject evidence had not been erroneously admitted against him." Such reasonable probability also manifests itself in the instant case, although, of course, under the new standard for assessing reversible error of constitutional character which is now applicable, petitioner's position becomes substantially stronger.

In the recent case of *Coolidge v. New Hampshire* (June 1971) 91 S.Ct. 2023, the Court voided a vehicle search which produced incriminating evidence against petitioner and remanded the case for further proceedings even though the brutal events of the case transpired more than seven days earlier. The Court, at page 2027 of its

opinion, stated:

> "We are called upon in this case to decide issues under the Fourth and Fourteenth Amendments arising out in the context of a state criminal trial for the commission of a particularly brutal murder. As in every case, our single duty is to determine issues presented in accord with the Constitution and the law."

The acts of bombing related in this case cannot be condoned, but neither can the conviction of a man on the basis of illegally obtained evidence be sanctioned, especially in view of the weak circumstantial character of the other evidence and the testimony of petitioner on the stand, denying any complicity with the bombings.

In the case at bar, the prosecution proceeded on a conspiracy theory, and instructions on the law of conspiracy were given in full to the jury. The impact of the Florida evidence was to involve petitioner, as a member of a secret spontaneous cell, in a conspiracy of militant character which included as part of its tactics terrorist bombings (Respondent's Brief pp. 74-78). The jury thus may well have been persuaded by the prosecution and predicated its conviction of petitioner of the charged offenses on its finding of the existence of the conspiracy as argued and petitioner's connection with and participation in it. The evidentiary effect of the Florida evidence on such findings cannot be summarily discounted, as it was by the Court of Appeal; nor can it be said that beyond a reasonable doubt such evidence was without any harmful effect on the jury and in no way contributed to its verdicts.

II

The Arrest Of Petitioner In Miami On October 28, 1968, Under An Arrest Warrant Issued In Los Angeles By The United States Commissioner, Was Based Upon An Insufficient Complaint And Without Probable Cause, And Such Arrest Was Unlawful. Hence, All Evidence Thereafter Obtained As A Consequence Of Such Arrest Was Tainted And Inadmissible.

A complaint was obtained by James G. Karis, a special agent of the F.B.I., from the office of the United States Attorney in Los Angeles, for alleged violation of 18 U.S.C. Section 1073, for flight to avoid prosecution. Said section provides in part:

> "Whoever moves or travels in interstate or foreign commerce with intent . . . *(1) to avoid prosecution* . . . under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, . . . which is a felony under the laws of the place from which he flees . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis added.)

Agent Karis signed and swore to the affidavit for the issuance of the complaint as being within his personal knowledge of the facts. However, his testimony showed that he had no personal knowledge of the facts set forth in the complaint and upon which the warrant of arrest was issued. All he knew was that there were two suspects in the case. He did not know personally that petitioner and Cornilloi moved and traveled in interstate commerce from Los Angeles to

Miami to avoid prosecution for felonies allegedly committed in Los Angeles. His supervisor told him that the affidavit was already prepared in the United States Attorney's office and he should go there and sign it, and he did so and swore to the same under oath without any personal knowledge.

The affidavit, or complaint, introduced in evidence as Exhibit No. 79, reads in part as follows:

> Juan Jorge Garcia Cardenas and Hector Cornillot did move and travel in interstate commerce from Los Angeles, California, within the Central District of California, to Miami, Dade County, Florida, with intent to avoid prosecution for crime of Section 375(4), Penal Code, illegal possession of explosives; Section 12303, Penal Code, use of destructive device; Section 12354, Health and Safety Code, malicious use, placing explosives with intent to terrify—felonies under California law.

Exhibit No. 79 further states that it is based upon:

> "I have been informed through official channels by Los Angeles Police Department that felony complaint against the two above subjects are outstanding in Los Angeles County for the three above-named offenses which are alleged to have been committed on July 19, 1968. I have been informed through official channels by F.B.I. Maimi that F.B.I. agents have observed the subjects in Miami within the last several days. Warrant was issued by Superior Court Judge Edward J. Olstym, October 28, 1968, Division 40 Superior Court of Los Angeles, California warrant number A 238025."

The document is signed "James D. Karis" and sworn to on

October 28, 1968, before Edward Drew, United States Commissioner.

An examination of the above document discloses that it was wholly insufficient to support the issuance of the arrest warrant by United States Commissioner Drew under the rules laid down by federal cases, notably *Giordenello v. United States*, 357 U.S. 480, 2 L.Ed. 1503. In that case, Agent Finley of the Federal Bureau of Narcotics obtained a warrant for the arrest of the petitioner on a written complaint that on January 26, 1965, at Houston, Texas, Giordenello did receive, etc., narcotic drugs with knowledge of unlawful importation. The petitioner there was arrested with heroin in his possession, and his motion to suppress was denied and he was convicted. The Supreme Court reversed the conviction, holding that the complaint was insufficient to provide an arrest warrant under Rules 3 and 4 of the Federal Rules of Criminal Procedure, Title 18, U.S.C. The Court, at page 485, stated:

> "Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that defendant has committed it.' The provisions of these rules must be read in the light of the constitutional requirements they implement."

At page 487, the Court further stated:

> "Here, in the absence of an indictment, the issue of probable cause had to be determined by the Commissioner and an adequate basis for

such a finding *had to appear on the face of the complaint*." (Emphasis added.)

The Court, in holding the complaint defective, stated at page 486:

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer. The insubstantiality of such an argument is illustrated by the facts of this very case, for Finley's testimony at the suppression hearing clearly showed that he had no personal knowledge of the matters on which his charge was based. In these circumstances, it is difficult to understand how the Commissioner could be expected to assess independently the probability that petitioner committed the crime charged. Indeed, if this complaint were upheld, the substantive requirements would be completely read out of Rule 4, and the complaint would be of only formal significance, entitled to perfunctory approval by the Commissioner. This would not comport with the protective purposes which a complaint is designed to achieve."

The complaint herein would be clearly insufficient

under the recent case of *Whitely v. Warden of Wyoming Penitentiary*, 28 L.Ed.2d 306. In that case an arrest warrant was issued on a complaint simply alleging that the defendants, on November 23, 1964, "did then and there unlawfully break and enter a locked and sealed building" (describing the location). Petitioner was arrested pursuant to a radioed bulletin. His car was searched and a number of items were seized, later being identified as taken from the burglarized building. In reversing the conviction, this Court, at page 313, stated:

> "In sum, the complaint on which the warrant issued here clearly could not support a finding of probable cause by the issuing magistrate. . . . Therefore, petitioner's arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial."

An officer must show probable cause to get a warrant from a magistrate, to the same effect as that necessary to make an arrest without a warrant. *Wrightson v. United States*, 222 F.2d 556; *United States v. Rivera*, 321 F.2d 704.

It has been held that the purpose of Section 1073 is to assist states by imposing penalties on *roving criminals*, who would be subject to extradition (*United States v. Brandenber* 144 F.2d 656; *Hemans v. United States*, 163 F.2d 228). In this case, petitioner, by no stretch of the imagination, could be considered as a "roving criminal." He lived with his wife in Miami and had a restaurant business in Miami, proving that he was not a "fly-by-night" or anything other than a stable businessman. He traveled to Los Angeles, where he

had relatives, and so was not a rover. Obviously, the statute was not intended to be used for the class of persons to which this petitioner belonged.

In order for the Government to invoke the statute, it had to prove that the petitioner traveled in interstate commerce *with the intent to avoid prosecution* in the place where the alleged offense occurred. In the case of *Hett v. United States*, 353 F.2d 791 (9th Cir.), the defendant was charged with leaving the state of Washington to go to Brazil to avoid prosecution in Washington. The court held that "flight" must be the dominant purpose of the travel and that mere absence from the state did not show the necessary intent to violate the section pertaining to unlawful flight.

In *Barrow v. Owen*, 89 F.2d 476, the court held that the gravamen of the offense was the *intent to avoid prosecution* and that mere absence was not enough.

In the case of *Maenza v. United States*, 242 F.2d 339, the court held that the evidence was insufficient to show unlawful flight. Accord: *Reis v. Marshall*, 192 F.Supp. 79.

In the light of the above cases, let us examine the complaint upon which the arrest warrant was issued in the instant case. Agent Karis alleged in the first paragraph that petitioner and Cornillot went from Los Angeles to Miami with the intent to avoid prosecution for certain stated offenses. Such allegation was a mere conclusion. No facts were stated upon which the Commissioner could find that there was actually a leaving of Los Angeles by petitioner or when he did leave. No facts were alleged to show any leaving with the specific intent to avoid prosecution. The defects in the complaint are even more glaring than in *Giordenello*, wherein the affiant alleged the transportation

and possession of contraband.

In the second paragraph of the complaint, all Karis alleged was that he had been informed "through official channels by the Los Angeles Police Department that felony complaints were outstanding" for Cornillot and petitioner, and that "he has been informed" through official channels by the F.B.I. that "F.B.I. agents have observed the suspects in Miami within the last several days," that is, just before October 28, 1968, over three months after the alleged crime. There were no allegations of facts indicating anything *other than a mere absence* by petitioner from California. There was no allegation showing that petitioner lived in California or how long he had been in this state, or when he left the state, or the circumstances of his leaving; nor were there any allegations that he did not live and work in Miami.

The entire complaint is based solely upon surmise, conclusion and inference, without any statement of facts or circumstances upon which the conclusions were based. Under *Giordenello* and *Whitely* the complaint must be held as fatally defective; and since it was a federal proceeding, there is no doubt that federal rules and decisions apply to the complaint, the issuance of the warrant, the illegality of the arrest and the search allegedly incident thereto, and all evidence obtained thereby.

The complaint was also defective under the rules enunciated in *Aguilar v. Texas*, 378 U.S. 108; *Durbin v. United States*, 221 F.2d 520; and *State v. Miller* (N.M.), 420 P.2d 240.

Agent Karis also stated in the complaint that he was informed through official channels of the Los Angeles Police Department that felony complaints were outstandi

against Cornillot and petitioner. That statement was false, as Karis well knew, and he testified that he had never been so personally advised and that he had sworn to the complaint only because his superior told him to (Rep. Tr. 272-274). Karis was not even positive that Agent McCarthy had told him that the suspects were in Miami. Furthermore, Karis did not know personally, as he alleged in the complaint, that Cornillot and petitioner had moved and traveled from Los Angeles to Miami to avoid prosecution (Rep. Tr. 275-279).

In *Giordenello*, the Supreme Court especially noted that Agent Finley signed the complaint without personal knowledge of the matters on which the charge was based.

In view of the false statements made by Karis, we contend that, for that reason—if not for others, the falsity vitiated the complaint.

In *Napue v. Illinois*, 360 U.S. 264, the Court vacated the judgment of conviction of Napue because the Assistant United States Attorney, knowing that a government witness was committing perjury at the trial, remained silent. The Court made the oft-quoted statement:

"A lie is a lie, no matter what its subject . . . "

The evidence obtained as a consequence of the illegal arrest was tainted and was inadmissible as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471; *United States v. Di Re*, 332 U.S. 581; *Rios v. United States*, 364 U.S. 253; *Lopez v. United States*, 373 U.S. 427; *People v. Haven*, 59 Cal.2d 713.

The use of the proceedings herein was also an unconstitutional application of Section 1073 to avoid a possible extradition contest. During the trial it was stipulated that no other complaints had been filed and warrants issued under

the section for at least two years previously by the United State Attorney's office in Southern California.

The charge against petitioner under Section 1073 was never prosecuted by the Government but was dismissed without further proceedings, indicating that such proceeding was instituted as a subterfuge to prevent an extradition contest, or even to permit the arrest to be used as a pretext for the search of petitioner's apartment or to obtain some incriminatory statements from him. The arresting agent testified that no evidence was found which would indicate any interstate flight (Rep. Tr. 320). No evidence was introduced by the prosecution at the trial to show petitioner had left Los Angeles to avoid prosecution.

We submit that the use of such proceeding was discriminatory, unwarranted, a subterfuge, and an unconstitutional application of the statute.

All evidence obtained as a consequence thereof was tainted and should not have been admitted. Certainly, the admission of such evidence was not harmless error but was prejudicial and an error of constitutional proportion.

III

The Evidence, Exclusive Of The Illegally Obtained Florida Evidence, Was Wholly Circumstantial And Insufficient To Support The Conviction Of Petitioner.

The only evidence connecting petitioner with the bombings in question, other than that seized in Florida as discussed above, was briefly as follows: Petitioner can to Los Angeles a few weeks before the bombings, as testi

by him, to visit relatives and to assist in the distribution of Cuban Power pamphlets and stickers. He accompanied Pedro Arnau, another Cuban, to pick up from the Colby Poster Printing Company in Los Angeles stickers for that organization. He was seen by a Mrs. Bustamente carrying boxes of stickers into the apartment of a Mr. Padron, but she was not sure if it was the previous year. He distributed three or four hundred stickers in the Los Angeles area, giving them to any Cuban who desired them. The fingerprint of his codefendant, Cornillot, was found on one sticker at the Mexican National Tourist Council office. His fingerprint was found on a sticker at the Air France office (Exhibit 67). The fingerprint expert called by the prosecution testified that there were other unidentifiable fingerprints on the stickers, that he was unable to determine when the fingerprints had been placed on the stickers, that there was no way of being able to say when the fingerprints might have been placed on the stickers.

Petitioner took the stand, and although he testified that he distributed hundreds of stickers similar to those found at the scenes of the explosions, he denied emphatically that he had anything to do with the bombings. He testified that he was in Miami at the time, having left Los Angeles by automobile in the latter part of June or early part of July, and that he had first learned of the bombings when he read about them in the Miami papers. This testimony was entirely uncontradicted.

It thus appears that the evidence linking him with the offenses was wholly circumstantial and speculative. The one fingerprint of petitioner found can easily be explained as having been one of three or four hundred handed out

and distributed by petitioner. This was therefore insufficient to connect him with the offenses.

The recent case of *United States v. Corso*, 439 F.2d 956, supports our contention. There, the defendant was convicted by jury of entering and burglarizing a savings and loan association. The evidence was wholly circumstantial. The defendant's fingerprints were found on the empty cove of a book of safety matches used to jam the lock on a door of the building in which the association was located, to prevent the locking of the door. A broken part of a screw driver was found and marks on the forced door where the matchbook was found. Defendant made purchases with cash soon after the burglary. More than a year previously defendant had worked laying tile in an adjacent building. Defendant could not remember where he had been on the week end of the burglary. The court reversed the convicti stating at page 957:

> "His [defendant's] fingerprints were not discov ered elsewhere on the premises, on the damage safes, desks or other articles in the Credit Unio Office which had been burglarized although so ten other fingerprints of unidentified persons were there obtained. The Government's finger print expert testified that it was impossible to determine how long defendant's fingerprints had been on the matchbook cover and admitt they could have been placed there months bef the burglary. Thus, there was no direct evide to show that defendant's fingerprints were im pressed upon the cover at the time of the bur The probative value of an accused's fingerpri

upon a readily movable object is highly questionable, unless it can be shown that such prints could have been impressed only during the commission of the crime. (Citing cases.)"

As in *Corso*, the fingerprint expert for the prosecution was unable to testify when the fingerprint of petitioner might have been impressed upon the sticker. Thus, the reasoning of the court in *Corso* applies to this case.

The only other evidence allegedly claimed by the prosecution to show that petitioner joined in the commission of the offenses was the extensive cross-examination of him with reference to the documents seized in Miami. This cross-examination was rigorous, inflammatory, and highly prejudicial, clearly affecting the verdict of the jury.

The Court of Appeal, although ruling that the Florida evidence was inadmissible, based its unfounded statement that the evidence against petitioner was overwhelming by referring specifically to the evidence seized in Florida and the consequent cross-examination based thereon (Appendix pp. 15 and 16). The court stated that petitioner admitted that he was a member of the Cuban Power organization, engaged in anti-Castro activities. However, said evidence was a result of the cross-examination of petitioner pertaining to the documents found in his apartment. The court, although ruling such evidence inadmissible, assumed the contrary position of using such evidence to support its statement that the evidence against petitioner was substantial.

The court also relied heavily on the statement allegedly made to Officer Cline, placing an interpretation thereon contrary to what petitioner—whose faculty in speaking

English was not very good – intended to mean by the statement. The court interpreted his statement as admission of guilt of the crimes. He testified that he meant only that he was active in a war of propaganda against the communists. Further, his question, "What do you think I'll get?" may have been actuated by a fear of being convicted, even though innocent. The statement was also out of context with other conversation. We have pointed out above that such statement was inadmissible both because it was tainted as "fruit of the poisonous tree" by petitioner's unlawful arrest and by reason of the lack of proper admonition of his rights under the *Escobedo* and *Miranda* rules.

The Court of Appeal also made a misstatement as follows: "Here we find bombs of the same type used in Miami and in Los Angeles explosions, ..." (Appendix p. 15). There is not a scintilla of evidence to support such statement, since the prosecution neither in direct nor cross-examination show any similarity between the two.

It thus appears that the Court of Appeal, to use a colloquial expression, was "riding two horses." It held the Florida evidence inadmissible but, nevertheless, made partial use of it in holding that the evidence established the guilt of petitioner. Obviously, it was affected and actuated by the seriousness of the offenses and by the very evidence which it held to be inadmissible. Its determination that the admission of the Florida evidence was harmless is refuted by its reference to and reliance upon a portion thereof.

CONCLUSION

In conclusion, we submit that the verdict of guilty by the jury was substantially founded upon evidence unlawfully obtained by violation of petitioner's constitutional rights; that such evidence was inflammatory, prejudicial and clearly motivated the verdict; that the errors of the trial court in admitting such evidence were not harmless errors, but were errors of constitutional dimensions, denying petitioner a fair trial and due process under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution; and that, by reason thereof, the conviction of petitioner should be reversed.

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and reverse the judgments of the California courts.

Respectfully submitted,

RUSSELL E. PARSONS and
EDWARD I. GRITZ

Attorneys for Petitioner

APPENDIX

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APPENDIX "A"

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 Crim. No. 18297 (Sup. Ct. No. 286683)

A majority of the signers of the following opinion certify that it does not meet the standards for official publication under rule 976.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

THE PEOPLE, Plaintiff and Respondent, v. JUAN JORGE GARCIA CARDENAS*, Defendant and Appellant.

[Filed July 28, 1971]

APPEAL from judgment of the Superior Court of Los Angeles County and order denying probation. Paul G. Breckenridge, Judge. Judgment affirmed; appeal from order dismissed.

Edward I. Gritz, for Defendant and Appellant.

Evelle J. Younger, Attorney General, William E. James, Assistant Attorney General, and Norman N. Flette, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and codefendant Cornillot were jointly indicted on fifteen felony counts in connection with bombings on July 19, 1968 of five separate buildings and offices in Los Angeles and Beverly Hills. Cornillot was

* The record on appeal alternately describes defendant as Garcia, Cardenas and Garcia-Cardenas. The indictment was amended June 18, 1969 to show defendant's true name as Juan Jorge Garcia Cardenas.

not tried with defendant.[1] Counts 1, 4, 7, 10 and 13 charged defendant with unlawfully discharging explosives (Pen. Code, § 375(4)); counts 2, 5, 8, 11 and 14 with possession of destructive devices (Pen. Code, § 12303); and counts 3, 6, 9, 12 and 15 with malicious use of explosives (Health & Saf. Code, § 12354). Defendant pleaded not guilty. Motions under sections 995 and 1538.5, Penal Code, and a motion to suppress Exhibits 80, 81 and 82 were denied.

After jury trial defendant was found guilty on all counts; his motion for new trial and application for probation were denied. The court, on its own motion arrested judgment on the counts of malicious use of explosives (counts 3, 6, 9, 12 and 15), and defendant was "discharged from further disabilities on those counts." He was sentenced to state prison for the term prescribed by law on the five bombing and the five possession counts, the sentence on the bombing of the Shell Data Processing Center (count 4) to run consecutively to the sentence on the bombing of the Mexican National Tourist Council (count 1), and the sentences on the other three bombing counts (counts 7, 10 and 13) to run concurrently with that on count 1; execution of sentences was stayed on the possession counts (counts 2, 5, 8, 11 and 14) until judgment becomes final on the bombing counts, at which

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1 The clerk's transcript prepared in conjunction with Cardenas' appeal does not contain copies of all the counts of which he was found guilty; some of the counts were amended and do not correspond to the counts as stated in the judgment. We have augmented the record to include the Superior Court file (Cal. Rules of Court, rule 12a) and find that the indictment set forth in defendant's record on appeal in fact applies to Corniliot. We perceive no purpose in having the clerk's transcript corrected since the reporter's transcript at pages 17 through 32 states the full text of all the counts charged against Cardenas and of which he was found guilty; the judgment conforms thereto.

time the stay was to become permanent. Defendant appeals from the judgment of conviction and the order denying probation; the appeal from the order will be dismissed. (Pen. Code, § 1237; *People v. Jackson*, 230 Cal.App.2d 485, 489.)

Facts

On April 5, 1968 defendant and codefendant Cornillot were arrested in Miami, Florida, for disturbing the peace. Defendant's car was driven to the police station, impounded, searched, and the contents thereof inventoried. The charges against the two men were subsequently dismissed. Defendant's automobile was returned to him. At the time he was unaware that the police had retained possession of some of the contents of his car.

Shortly after midnight on July 19, 1968, five buildings in Los Angeles and Beverly Hills were bombed: the Mexican National Tourist Council (count 1) in Beverly Hills; the Shell Data Processing Center (count 2), approximately 50 yards distant from the tourist agency; the Air France office (count 7) in downtown Los Angeles; the Japan Air Lines office (count 10) approximately a block and a half west of Air France; and the Government of Mexico Tourist Department (count 13), midway between Los Angeles and Beverly Hills. Stickers with the words "Unete Poder Cubano" (United Cuban Power) were found at the bombed buildings; at the Mexican Tourist Council (Exhibit 66), at the Air France office (Exhibit 64 and Exhibit 67), and at the Shell Center (Exhibit 65).

It was stipulated at trial "that the stickers . . . marked . . . 64, 65, 66 and 67 were ordered from [Colby Poster Printing Company in Los Angeles] on May 25, 1968 by Pedro . . . Arnau . . . ; that the stickers were ordered in

the quantity of 1,000, and that the stickers were picked up on June 26, 1968, by Pedro Arnau and Juan Garcia-Cardenas, the defendant.

A Mrs. Bustamente testified that prior to June or July 1968 she had observed defendant and codefendant Cornillot on numerous occasions carrying cardboard boxes into one Adolfo Padron's apartment and saw stickers on the boxes reading "Cuban Power."

A fingerprint expert testified that he found Cornillot's fingerprints on a sticker at the Mexican National Tourist Council office (Exhibit 66), and defendant's fingerprints on a sticker at the Air France office (Exhibit 67).

A criminologist assigned to the Scientific Investigation Division, Los Angeles Police Department, investigated the various bombed locations. He testified that analysis of the debris found at each location indicated that homemade bombs from a common source had been used; that he found fragmentary evidence of red, white and blue material with foreign language thereon which had been wrapped around cardboard boxes in which the bombs had been placed and wrapped with a type of masking tape; that the bombs had been constructed with flat powder fuses containing red thread; that the main charge had been dynamite; and that the bombs had been placed in mail boxes or positioned near doors.

On October 28, 1968, upon receipt of information via radio that a fugitive warrant had been issued in Los Angeles for the arrest of defendant, FBI agents arrested defendant in Miami. Without his consent they searched his apartment and found red, white and blue stickers with the words "Poder Cubano" and the printed name "Jose Marti" (Exhibit

85), a three-page handwritten document entitled "Poder Cubano Unido, Celula, Espontanea No: 1 GTC" (Exhibit 86[2]), two receipts for donations (Exhibit 87), a three-page typed document entitled "Poder Cubano Tribuno Del Patrido Revolucionaria de Cubano" (Exhibit 88), a document entitled "Boletin de Guerre" (War Bulletin) (Exhibit 89[3]), and a document entitled "Poder Cubano Celula No. 1 Gerardo Torres Contreras" (Exhibit 90[4]).

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2 Exhibit 86 reads in pertinent part as follows:

"United Cuban Power.

"Spontaneous Cell No. 1 G.T.C.

. . .

"Through this medium we inform the exiles in general, that all secret spontaneous cells that operate in different cities of the U.S. close ranks . . . not to criticize any medium used in the battle for the prompt overthrow of the existing regime in Cuba.

" . . . The only thing that will carry us to victory will be the Cuban revolution. . . .

"For the liberty of Cuba we call the Cubans to incorporate in the battle - this is the time where we have to maintain high our combat flag at whatever price that may be necessary. . . .

"Every Cuban has the duty of trying by all means within his reach to cooperate in the liberation of our country.

. . .

"And that's why we say that we will maintain our position in any place where we may be, attacking the enemies of our country that trade with the blood and sorrow of our Cuba. . . .

"If we want to criticize or judge, we should first fight to free our country. . . . "

3 Exhibit 89 reads in part:

"We are responsible of the revolutionary punishment against the French offices, and we ask the French Goverment to break its treacherous commerce with the Castro communism."

4 Exhibit 90 reads in part:

"Cuban Power.

"Cell No. 1. Gerardo Torres Contreras:

. . .

"Third: Encourage the militancy of those exiled for their participation of every type of struggle. . . .

. . .

"Ninth: Encourage actions in the world of the Cuban revolutionaries,

On December 21, 1968 Sergeant Cline of the Los Angeles Police Department, who had gone to Miami to transport defendant to Los Angeles, advised him of his constitutional rights. Within two hours thereafter, defendant and the officer engaged in a short conversation while airborne en route to Los Angeles. The officer asked defendant if he was aware that a Dr. Bosch had received five to ten years for terroristic activities; defendant replied: "Yes. What do you think I'll get?" Defendant added: "We are patriots and we believe in what we are doing. We are fighting on a foreign soil just as you are in Vietnam."

Defendant testified that he was 31 years old, that he had been born in Cuba, and spoke and understood some English; that at the time of the bombings he was a member of a movement known as "Poder Cubano" (Cuban Power), and assisted in the propagation of its principles by distributing pamphlets, literature and stickers; that he lived in Miami, where he operated a restaurant, and on occasions had gone to Los Angeles to visit relatives and to assist Los Angeles members of the Cuban movement; that he had assisted Pedro Arnau in picking up stickers at a Los Angeles printing plant; that he did not carry any boxes into Mr. Padron's apartment; that he had not met codefendant Cornillot in Los Angeles by prearrangement, but had seen him several times on the street during June 1968; that he was aware that Arnau and Padron were survivors of the Bay of Pigs incident and were members of "Poder Cubano"; that he believed that the only way to overthrow Castro was by the use of revolutionary means; that the

---

4 (cont'd) to blockage commerce with tyranny.

"Miami, September 24, 1968.

"Dr. Orlando Bosch, Political Delegate Cuban Power."

inherent plan of "Poder Cubano" to accomplish this result was to prevent foreign countries from trading with Cuba, thus bringing about Cuba's economic destruction, that he had written the full text of Exhibit 86 (see fn. 2, *ante*), that he was in Miami on the day of the bombings, having returned from Los Angeles by automobile during the latter part of June or early July 1968, and that he was not aware until his trial in Los Angeles that the Miami police had secretly retained articles taken from his car on the occasion of his April 1968 arrest on the charge of disturbing the peace.

Contentions

Defendant contends that each of his arrests in Miami was unlawful and that the searches and seizures incidental thereto were illegal; that his statements to the Los Angeles police officer were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602]; that the federal fugitive warrant was obtained improperly by federal agents, was a mere subterfuge to deprive him of extradition rights and to subject his apartment to an exploratory search; that the trial judge erred prejudicially in giving instructions on conspiracy; and that the evidence was insufficient to sustain the judgment of his conviction.

First Miami Arrest

Defendant contends that the Miami police had no probable cause to arrest him on April 5, 1968 for disturbing the peace; that the search of his car which uncovered Exhibits 80, 81 and 82 was illegal and that the exhibits were improperly admitted into evidence at his trial in Los Angeles. He also suggests that lack of probable cause is amply demonstrated by the fact that the charge for which he was arrested was subsequently dismissed.

The facts surrounding that arrest are summarized: while eating at a drive-in, Officer Chacon of the Miami Police Department informed Officer Estafan that defendant and Cornillot were taking pictures of their police cars from across the street; after eating, Estafan continued on routine patrol in his car, while Chacon remained, sometime later Chacon radioed that he was stopping defendant's car and requested backup assistance from Estafan; on arrival at the scene Estafan heard Cornillot and defendant speaking loudly to Chacon; as he walked by defendant's car he observed a camera and a tape recorder in the car; Cornillot grabbed the officer and attempted to get between him and the car, apparently to prevent the officer from looking inside; Cornillot yelled at the officer that he had no right to search or look into the auto; Cornillot was placed under arrest for disturbing the peace (Fla. Stats. Ann., § 877.03) and for drunkenness (Fla. Stats. Ann., § 856.01); defendant began to take Estafan's picture, yelling that he had his rights and that he was a "Cuban Power"; defendant was then arrested for disturbing the peace.

An arrest by a police officer without a warrant is justified in Florida when the offense is committed in the presence of the officer. (Fla. Stats. Ann., § 901.15.) In view of the conduct of defendant and his companion, we hold that the arrests were based on probable cause. (*People v. Ingle*, 53 Cal.2d 407, 412-413.) The fact that the charges against defendant were subsequently dismissed has no bearing on the legality of his arrest. (*Coverstone v. Davies*, 38 Cal.2d 315, 319; *Fraher v. Superior Court*, 272 Cal.App.2d 155, 161; *Smith v. State* (Fla.) 155 So.2d 826.)

Officer Estafan of the Miami Police Department testi-

fied that when an arrest is made of the sole occupant of a car in Florida, "the car becomes the responsibility of our department . . . I'm responsible for the valuables of the car and of the car. . . . I make out a pound [*sic*] slip and inventory . . . all the items of value in the car." This was a procedure apparently authorized by statute. (See Fla. Stats. Ann., § 186.59.) At the scene the officer made a cursory examination of the car; he observed a gun and shells in the glove compartment and bundles of printed material in the trunk. On instructions from the Intelligence Unit of the Miami Police Department, the car was then taken to police headquarters where a formal impound and inventory were made. A search of the trunk uncovered 60 packages, each containing 1,000 pamphlets entitled "Declaration of Principles of Cuban Power, Cell No. 1, Gerrardo Torres Contreras," approximately 75 red, white and blue placards depicting a person designated as Jose Marti, and 75 red, white and blue bumper stickers with a picture of Jose Marti and the words "Poder Cubano." Specimens of each of the above were retained by the police when they returned the auto and its contents to defendant; the specimens were introduced into evidence, being designated as Exhibits 80, 81 and 82, respectively.

Defendant contends that the impound was a pretext for an illegal search and that the fruits thereof, Exhibits 80, 81 and 82, were inadmissible. The People argue that an inventory search of an impounded auto was legal as of the date of the instant search (April 1968), and that the subsequent decision restricting such searches (*Mozzetti v. Superior Court*, 4 Cal.3d 699) should not be applied retroactively.

We have no hesitancy in holding that *Mozzetti* is applicable to this case. *Mozzetti* restates a principle first enunciated in 1964, the Supreme Court stating on page 711: "In *People v. Burke* (1964) *supra*, 61 Cal.2d 575, the police had lawful custody of the automobile of a suspect arrested on suspicion of burglary. Nevertheless, this court invalidated a search of the vehicle at the police storage lot. We explicitly rejected the People's contention that the authority to remove and store the vehicle under Vehicle Code sections 22651, subdivision (h), and 22850 encompassed authority to search: 'The officers were authorized by these sections to remove defendant's car from the highway and impound it but the sections do not purport to authorize the making of a search.' (*Id.* at p. 580.)"

We hold that the product of the search of defendant's auto was inadmissible under California law. Although questions of admissibility of evidence are decided by the law of the forum (11 Cal.Jur.2d, Conflict of Laws, § 97, p. 201; Rest., Conflict of Laws, § 597), we note that as of the date of the search, evidence obtained under such circumstances was also inadmissible in Florida. (*Miller v. State* (Fla.) 137 So.2d 21, 26.) Exhibits 80, 81 and 82 were improperly admitted into evidence. In view of this conclusion we find it unnecessary to discuss other contentions raised by defendant with respect to the admissibility of these three exhibits, namely: that the search was remote from the place of arrest; that the search was at a different location than the usual place for making an inventory; and that the nonconsensual retention by the Miami police of the three specimens made the exhibits inadmissible.

Second Miami Arrest

Defendant contends that his arrest on October 28, 1968 by FBI agents was based on an improperly issued federal warrant; alternately, that if his arrest was proper, the search exceeded the scope of the crime for which he was arrested and was likewise illegal; and that the federal action was an unwarranted interference with state extradition proceedings and a pretext for an exploratory search

We first consider the legality of defendant's arrest. It appears that the FBI and the local authorities had conducted a joint investigation of the case. The facts developed caused each agency to consider defendant and Cornillot as prime suspects. In October, approximately three months after the bombings, Special Agent McCarthy, in charge of the case for the FBI, learned that the two men were in Florida and was aware of the intention of the FBI to obtain unlawful flight complaints against each. At about the same time Sergeant Cline, Los Angeles Police Department, secured from the district attorney's office a complaint against each man and warrants for their arrest. On October 28 Special Agent Karis, FBI, pursuant to instructions from his supervisor, signed a federal complaint against each man, stating in his affidavit that he had been "informed through official channels by the Los Angeles Police Department that felony complaints against the above two suspects are outstanding in Los Angeles County" for the July 19, 1968 offenses; that "on or about July 20, 1968" each man "did move and travel in interstate commerce . . . with intent to avoid prosecution . . ." (18 U.S.C.A., § 1073); and that he had been "informed through official channels by FBI Miami that FBI agents have observed the subjects in Miami within the last several

days." Federal warrants were issued and served on defendant and Cornillot on October 28.

Relying on *Giordenello v. United States,* 357 U.S. 480 [2 L.Ed.2d 1503, 78 S.Ct. 1245].) defendant contends that the affidavit to the federal complaint was deficient in that it failed to set forth essential facts constituting the offense charged and in that it failed to show probable cause to believe that the offense had been committed and that defendant had committed it; and that as a result his arrest was illegal.

The affidavit in *Giordenello* set forth no facts, but only the conclusion that on a particular day the defendant possessed narcotics in violation of a federal law. In holding that it was defective and that the resultant arrest was illegal, the Supreme Court said: "The Complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complaint's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made." (357 U.S. at p. 486 [2 L.Ed.2d at pp. 1509-1510].)

Giordenello is readily distinguishable. Here we have an affidavit setting forth facts and the source thereof. (See *Bowers v. Coiner* (S.D. W.Va. 1970) 309 F.Supp. 1064.) The affidavit was sufficient and the arrest was legal.

We next consider the legality of the search of defendant's apartment and seizure of evidence. The search occurred prior to *Chimel v. California,* 395 U.S. 752 [23 L.Ed.2d 685, 697, 89 S.Ct. 2034], and its legality is determined by pre-*Chimel* standards. (*People v. Edwards,* 71 Cal.2d 1096, 1107.) It has been repeatedly stated that where an arrest is lawful, a reasonable search incidental thereto is valid. (*Ker v. California,* 374 U.S. 23 [10 L.Ed.2d 726, 742-744, 83 S.Ct. 1623];

People v. Cockrell, 63 Cal.2d 659, 667.) In order to be incident to an arrest the search must be limited to the premises where the arrest is made, have a definite object and be reasonable in scope. (*Cockrell, supra*, 63 Cal.2d at p. 667.) The scope of a search is unreasonable when the purpose of it is to uncover evidence unrelated to the crime for which the arrest is made, and evidence recovered as a result thereof is inadmissible. (*People v. Schaumloffel*, 53 Cal.2d 96.) Thus it was held in *People v. Baca*, 254 Cal.App.2d 428, that contraband found during a search of defendant's home following her arrest on a bench warrant was inadmissible, the court pointing out on page 431 that defendant was arrested as a fugitive, that once the police had discovered her, their purpose had been fulfilled and that "[t]here was no need to search further once the object of the search had been found."

The principles of *Baca, supra*, apply here. Defendant was not arrested on the state charges or under the state warrant; the arrest was made on the federal warrant issued in connection with the federal charge of flight to avoid prosecution. The search and seizure was illegal; Exhibits 85-91 (fns. 2, 3, 4, *ante*) were improperly received in evidence.

It appears that at the time of defendant's arrest he was warned of his *Miranda* rights by an FBI agent. During the search of his apartment one of the agents asked defendant if the handwritten document, Exhibit 86 (fn. 2, *ante*), was in his handwriting; defendant acknowledged that it was.

At trial defendant was asked on cross-examination about Exhibit 89 (fn. 3, *ante*) He admitted that he wrote it in September or October 1968.

Since we have held that Exhibits 86 and 89 were the product of an illegal search and seizure, and were improperly

received in evidence, it necessarily follows that his statement with respect to Exhibit 86 and his testimony with respect to Exhibit 89 were not admissible.

Statement to Los Angeles Police Officer

Defendant contends that the following statement admitted into evidence violated rights guaranteed by *Miranda*: "We are all patriots and we believe in what we are doing. We are fighting on a foreign soil just as you are in Vietnam."

There is no merit to this contention. It was made by defendant to Sergeant Cline of the Los Angeles Police Department, during travel to Los Angeles, after defendant had been adequately warned of his *Miranda* rights. Furthermore, the record clearly shows and defendant admitted that at the time of the statement, Cline was not conducting any interrogation of him, but that the statement was made voluntarily during "idle conversation."

Instructions on Conspiracy

Defendant contends that since he was not charged with conspiracy, the trial court erred in instructing the jury on conspiracy.

We do not agree. As stated in *People v. Washington*, 71 Cal.2d 1170, 1174: "When there is evidence of a conspiracy to commit the substantive offenses charged, it is not error to instruct the jury on the law of conspiracy even though no conspiracy is charged. [Citations.]" (Cf. *People v. Fain*, 18 Cal.App.3d 137, 143.) Here there was substantial evidence of a conspiracy, and the prosecution used it to prove the guilt of the substantive offenses.

Sufficiency of the Evidence

Disregarding Exhibits 80-82 and 85-91, obtained in the two Miami searches, and defendant's admission that Exhibits

86 and 89 were in his handwriting, all of which evidence we have held to have been inadmissible, we review the remaining evidence to determine its sufficiency to sustain the verdict. In doing so we are governed by principles set forth in *People v. Redmond*, 71 Cal 2d 745, 755: "This court must review the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Sweeney*, 55 Cal 2d 27, 33 [9 Cal Rptr 793, 357 P.2d 1049].) If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Robillard*, 55 Cal 2d 88, 93 [10 Cal Rptr. 167, 358 P.2d 295, 83 A L R.2d 1086]; *People v. Love*, 53 Cal.2d 843, 850-851 [3 Cal Rptr. 665, 350 P.2d 705].) The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt (*People v. Hillery*, 62 Cal.2d 692, 702-703 [44 Cal Rptr. 30, 401 P.2d 382].)

"Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it."

Here we find bombs of the same type used in Miami and in Los Angeles explosions, "Cuban Power" wrappers on the bombs and "Cuban Power" stickers found at several of the bomb sites. The evidence that the bombings were all perpetrated by members of the "Cuban Power" organization is strong. There is evidence that the organization was engaged in anti-Castro activities. Defendant admitted membership

therein. We recognize that mere membership in a subversive group would be insufficient to sustain a conviction of a crime committed by some members thereof (*Keyishian v. Board of Regents of New York*, 385 U.S. 589 [17 L.Ed.2d 629, 642-643, 87 U.S. 675]; but here we have significant additional evidence: defendant's presence in Los Angeles at about the time of the bombings; the fact that he and one Arnau picked up similar stickers at a Los Angeles printing establishment on June 28, 1968; evidence that in May or June of 1968 defendant and codefendant Cornillot were seen taking cardboard boxes with "Cuban Power" stickers on them into the Los Angeles apartment of a Mr. Padron, a survivor of the Bay of Pigs invasion; evidence that the bombs had been housed in cardboard boxes; evidence that codefendant's fingerprints were found on a "Cuban Power" sticker on the wall of the Mexican National Tourist Council office immediately after the bombings, and defendant's fingerprints were found on a similar sticker on a pillar at the Air France office immediately after the bombings; in addition, there is defendant's voluntary statement to a police officer during his transportation from Miami to Los Angeles: "What do you think I'll get? . . . We are patriots and we believe in what we are doing. . . . We are fighting on foreign soil just as you are in Vietnam."

There is substantial evidence (*People v. Bassett*, 69 Cal.2d 122, 139), not only of his membership in the "Cuban Power" organization, but of his conspiracy with other members thereof to commit criminal acts (Pen. Code, § 31; *People v. Hardeman*, 244 Cal.App.2d 1, 41), and also of his commission of the crimes of which he was convicted.

The evidence of guilt is so strong that we unhesitantly conclude beyond a reasonable doubt that the errors in

the admission of evidence did not contribute to the verdict obtained (*Chapman v. California*, 386 U S 18, 24 [17 L.Ed. 2d 705, 710, 87 S.Ct 824]), and that it is not reasonably probable that a result more favorable to the defendant would have been reached in the absence of the errors. (*People v. Watson*, 46 Cal.2d 818, 836) The errors were not prejudicial; they did not result in a miscarriage of justice; they did not deprive defendant of a fair trial (Cal Const., art VI, § 13)

Judgment affirmed; appeal from order denying probation dismissed

CERTIFIED FOR NONPUBLICATION

SCHWEITZER, J

We concur:

FORD, P.J.

ALLPORT, J

PERTINENT PORTIONS OF STATUTES INVOLVED

California Penal Code

§ 375. Places of public assemblage; injurious, nauseous, or offensive substances; use or preparation; punishment

(1) It shall be unlawful to . . . discharge . . . or attempt to . . . discharge . . . in, upon or about any . . . place of business . . . [any] substance or matter of any kind which is injurious to person or property, ...

. . . .

(4) Any person who, in violating any of the provisions of subdivision (1) of this section, wilfully employs or uses any . . . explosives, shall be guilty of a felony and shall be punished by imprisonment in the State prison for not less than one year and not more than five years.
(Added by Stats. 1931, c. 798, p. 1660, § 1. Amended by Stats. 1933, c. 449, p. 1168, § 1.)

§ 12303. Sale, possession or transportation; other than fixed ammunition; punishment

Any person, firm or corporation who, within this state sells, offers for sale, possesses or knowingly transports any destructive device other than fixed ammunition of a caliber greater than .60 caliber, except as provided by this chapter, is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the county jail for a term not to exceed one year, or in state prison for a term

not to exceed three years, or by a fine not to exceed five thousand dollars ($5,000), or by both such fine and imprisonment

(Added by Stats. 1967, c. 1283, p. 3086, § 1.)

§ 1538.5 Motion to return property or suppress evidence

(a) Grounds

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on * * * either of the following grounds:

(1) The search or seizure without a warrant was unreasonable * * *

(d) Effect of granting motion

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people

(i) Felony; renewal of motion at special hearing; review

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall

be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

. . . .

(m) Exclusive pre-trial remedy; review on appeal after conviction

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

United States Code

18 U.S.C. § 1073. Flight to avoid prosecution or giving testimony

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees,

shall be fined not more than $5,000 or imprisoned not more than five years, or both

United States Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized

Amendment V

No person shall be deprived of life, liberty, or property, without due process of law;

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on DECEMBER 19th, 1971, I served the within PETITION FOR WRIT OF CERTIORARI (Cardenas v. State of California) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, Superior Court of Los Angeles County
111 North Hill Street
Los Angeles, California 90012
For: Honorable Paul G. Breckenridge, Judge
[1 copy]

Attorney General of the State of California
600 State Building
Los Angeles, California 90012
[2 copies]

District Attorney of the County of Los Angeles
600 Hall of Justice
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on DECEMBER 19th, 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 322 Main Street, Huntington Beach, Calif.
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IN THE

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October Term, 1971
No. 817

JUAN JORGE GARCIA CARDENAS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1971
No. 817

JUAN JORGE GARCIA CARDENAS,

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vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

On July 28, 1971, the California Court of Appeal, Second Appellate District, Division Three, rendered an unpublished opinion affirming the guilt of petitioner of five counts of unlawfully discharging explosives in violation of California Penal Code section 375(4); five counts of possession of destructive devices in violation of California Penal Code section 12303 and five counts of malicious use of explosives in violation of section 12354 of the California Health and Safety Code. Said opinion is attached as Appendix.

On August 17, 1971, a petition for hearing was denied by the Court of Appeal and on September 22, 1971, a hearing was denied by the California Supreme Court, both without opinion.

Jurisdictional Statement

Petitioner invokes jurisdiction of this Honorable Court under Title 28, United States Code section 1257-(3). (Petn. p. 2.)

Questions Presented

Petitioner raises the following questions:

1. Was certain "Florida evidence," held inadmissible by the Court of Appeal, harmless error?

2. Did the introduction of the said evidence deny petitioner due process and a fair trial?

3. Was the Federal Arrest Warrant defective?

4. Were statements made by petitioner to Officer Cline on the airplane from Miami to Los Angeles tainted by an unlawful arrest and a defective admonition of rights?

5. Was the evidence insufficient to sustain the conviction?

Statement of the Case

The Statement of the Case as set out by the Court of Appeal on pages 2 and 3 of the opinion is set out herein:

> "Defendant and codefendant Cornillot were jointly indicted on fifteen felony counts in connection with bombings on July 19, 1968 of five separate buildings and offices in Los Angeles and Beverly Hills. Cornillot was not tried with defendant.[1] Counts 1, 4, 7, 10 and 13 charged de-

[1]"The Clerk's transcript prepared in conjunction with Cardenas; appeal does not contain copies of all the counts of which he was found guilty; some of the counts were amended and do not correspond to the counts as stated in the judgment. We have

fendant with unlawfully discharging explosives (Pen. Code, § 375(4)); counts 2, 5, 8, 11 and 14 with possession of destructive devices (Pen. Code, § 12303); and counts 3, 6, 9, 12 and 15 with malicious use of explosives (Health & Saf. Code, § 12354). Defendant pleaded not guilty. Motions under sections 995 and 1538.5, Penal Code, and a motion to suppress Exhibits 80, 81 and 82 were denied.

"After jury trial defendant was found guilty on all counts; his motion for new trial and application for probation were denied. The court, on its own motion arrested judgment on the counts of malicious use of explosives (counts 3, 6, 9, 12 and 15), and defendant was 'discharged from further disabilities on those counts.' He was sentenced to state prison for the term prescribed by law on the five bombing and the five possession counts, the sentence on the bombing of the Shell Data Processing Center (count 4) to run consecutively to the sentence on the bombing of the Mexican National Tourist Council (count 1), and the sentences on the other three bombing counts (counts 7, 10 and 13) to run concurrently with that on count 1; execution of sentences was stayed on the possession counts (counts 2, 5, 8, 11 and 14) until the judgment becomes final on the bombing counts, at which time the stay was to become permanent. Defendant appeals from the judgment of convic-

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augmented the record to include the Superior Court file (Cal. Rules of Court, rule 12a) and find that the indictment set forth in defendant's record on appeal in fact applies to Cornillot. We perceive no purpose in having the clerk's transcript corrected since the reporter's transcript at pages 17 through 32 states the full text of all the counts charged against Cardenas and of which he was found guilty; the judgment conforms thereto."

tion and the order denying probation; the appeal from the order will be dismissed. (Pen. Code, § 1237; People v. Jackson, 230 Cal. App. 2d 485, 489.)"

Statement of Facts

The Statement of Facts is adopted from that of pages 3-9 of the Opinion of the Court of Appeal:

"On April 5, 1968 defendant and codefendant Cornillot were arrested in Miami, Florida, for disturbing the peace. Defendant's car was driven to the police station, impounded, searched, and the contents thereof inventoried. The charges against the two men were subsequently dismissed. Defendant's automobile was returned to him. At the time he was unaware that the police had retained possession of some of the contents of his car.

"Shortly after midnight on July 19, 1968, five buildings in Los Angeles and Beverly Hills were bombed: the Mexican National Tourist Council (count 1 in Beverly Hills; the Shell Data Processing Center (count 2), approximately 50 yards distant from the tourist agency; the Air France office (count 7) in downtown Los Angeles; the Japan Air Lines office (count 10) approximately a block and a half west of Air France; and the Government of Mexico Tourist Department (count 13), midway between Los Angeles and Beverly Hills. Stickers with the words "Unete Poder Cubano" (United Cuban Power) were found at the bombed buildings: at the Mexican Tourist Council (Exhibit 66), at the Air France office (Exhibit 64 and Exhibit 67), and at the Shell Center (Exhibit 65).

"It was stipulated at trial 'that the stickers . . . marked . . . 64, 65, 66 and 67 were ordered from [Colby Poster Printing Company in Los Angeles] on May 25, 1968 by Pedro . . . Arnau. . . .; that the stickers were ordered in the quantity of 1,000, and that the stickers were picked up on June 26, 1968, by Pedro Arnau and Juan Garcia-Cardenas, the defendant. . . .'"

"A Mrs. Bustamente testified that prior to June or July 1968 she had observed defendant and codefendant Cornillot on numerous occasions carrying cardboard boxes into one Adolfo Padron's apartment and saw stickers on the boxes reading 'Cuban Power.'

"A fingerprint expert testified that he found Cornillot's fingerprints on a sticker at the Mexican National Tourist Council office (Exhibit 66), and defendant's fingerprints on a sticker at the Air France office (Exhibit 67).

"A criminologist assigned to the Scientific Investigation Division, Los Angeles Police Department, investigated the various bombed locations. He testified that analysis of the debris found at each location indicated that homemade bombs from a common source had been used; that he found fragmentary evidence of red, white and blue material with foreign language thereon which had been wrapped around cardboard boxes in which the bombs had been placed and wrapped with a type of masking tape; that the bombs had been constructed with flat powder fuses containing red thread; that the main charge had been dynamite; and that the bombs had been placed in mail boxes or positioned near doors.

"On October 28, 1968, upon receipt of information via radio that a fugitive warrant had been issued in Los Angeles for the arrest of defendant, FBI agents arrested defendant in Miami. Without his consent they searched his apartment and found red, white and blue stickers with the words 'Poder Cubano' and the printed name 'Jose Marti' (Exhibit 85), a three-page handwritten document entitled 'Poder Cubano Unido, Celula, Espontanea #1 GTC' (Exhibit 86[2]), two receipts for donations (Exhibit 87), a three-page typed document entitled 'Poder Cubano Tribuno Del Partido Revolucionario de Cubano' (Exhibit 88), a document entitled 'Boletin de Guerre' (War Bulletin) (Exhibit 89[3]), and a document entitled

[2]"Exhibit 86 reads in pertinent part as follows:

" 'United Cuban Power.

" 'Spontaneous Cell #1 G.T.C.

" . . .

" 'Through this medium we inform the exiles in general, that all secret spontaneous cells that operate in different cities of the U.S. close ranks . . . not to criticize any medium used in the battle for the prompt overthrow of the existing regime in Cuba. .

" '. . . The only thing that will carry us to victory will be the Cuban revolution. . . .

" 'For the liberty of Cuba we call the Cubans to incorporate in the battle—this is the time where we have to maintain high our combat flag at whatever price that may be necessary. . . .

" 'Every Cuban has the duty of trying by all means within his reach to cooperate in the liberation of our country.

" . . .

" 'And that's why we say that we will maintain our position in any place where we may be, attacking the enemies of our country that trade with the blood and sorrow of our Cuba. . . .

" 'If we want to criticize or judge, we should first fight to free our country. . . .' "

[3]"Exhibit 89 reads in part:

" 'We are responsible of the revolutionary punishment against the French offices, and we ask the French govern-

'Poder Cubano Celula #1, Gerardo Torres Contreras' (Exhibit 90[4]).

"On December 21, 1968 Sergeant Cline of the Los Angeles Police Department, who had gone to Mexico to transport defendant to Los Angeles, advised him of his constitutional rights. Within two hours thereafter, defendant and the officer engaged in a short conversation while airborne en route to Los Angeles. The officer asked defendant if he was aware that a Dr. Bosch had received five to ten years for terroristic activities; defendant replied: 'Yes. What do you think I'll get?' Defendant added: 'We are patriots and we believe in what we are doing. . . . We are fighting on a foreign soil just as you are in Vietnam.'

"Defendant testified that he was 31 years old, that he had been born in Cuba, and spoke and understood some English; that at the time of the bombings he was a member of a movement known as 'Poder Cubano' (Cuban Power), and assisted in the propagation of its principles by distributing pamphlets, literature and stickers; that he lived in Miami, where he operated a restaurant, and on occasions had gone to Los Angeles to visit rela-

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ment to break its treacherous commerce with the Castro communism.' "

[4]"Exhibit 90 reads in part:

" 'Cuban Power.

" 'Cell #1. Gerardo Torres Contreras:

"

" 'Third: Encourage the militancy of those exiled for their participation of every type of struggle. . . .

"

" 'Ninth: Encourage actions in the world of the Cuban revolutionaries, to blockage commerce with tyranny. . . .

" 'Miami, September 24, 1968.

" 'Dr. Orlando Bosch, Political Delegate Cuban Power.' "

tives and to assist Los Angeles members of the Cuban movement; that he had assisted Pedro Arnau in picking up stickers at a Los Angeles printing plant; that he did not carry any boxes into Mr. Padron's apartment; that he had not met codefendant Cornillot in Los Angeles by prearrangement, but had seen him several times on the street during June 1968; that he was aware that Arnau and Padron were survivors of the Bay of Pigs incident and were members of 'Poder Cubano'; that he believed that the only way to overthrow Castro was by use of revolutionary means; that the inherent plan of 'Poder Cubano' to accomplish this result was to prevent foreign countries from trading with Cuba, thus bringing about Cuba's economic destruction, that he had written the full text of Exhibit 86 (see fn. 2, *ante*); that he was in Miami on the day of the bombings, having returned from Los Angeles by automobile during the latter part of June or early July 1968; and that he was not aware until his trial in Los Angeles that the Miami police had secretly retained articles taken from his car on the occasion of his April 1968 arrest on the charge of disturbing the peace."

Summary of Argument

This Court need not involve itself with the harmless error rule since the materials deemed inadmissible by the Court of Appeal are admissible under Federal standards. Thus evidence gleaned from the inventory of a car and a search of an apartment incident to an arrest for inter-state flight from prosecution are admissible under Federal constitutional standards. The affidavit for the arrest of petitioner was also proper and stated sources and reasons for the arrest.

If, for the sake of argument only, the fruits of the inventory of the vehicle and the search of the apartment were inadmissible, their admission was harmless beyond a reasonable doubt.

Petitioner's statements to Sergeant Cline on the airplane were not tainted by any illegality and the admonition of rights was proper.

Sufficiency of the evidence is not a Federal question, but the evidence was sufficient to sustain the conviction.

ARGUMENT

I

THE HARMLESS ERROR RULE IS INAPPLICABLE IN THAT EVIDENCE HELD INADMISSIBLE BY THE COURT OF APPEAL IS PROPERLY ADMISSIBLE UNDER FEDERAL STANDARDS

A. The Harmless Error Rule Is Inapplicable

Petitioner argues that although the Court of Appeal held that certain items found in an inventory of his car after his arrest for disturbing the peace in Miami, Florida, and a later search of his apartment pursuant to his arrest for flight to avoid prosecution in California were inadmissible, the court's holding that the admission of these items into evidence was harmless error, was erroneous. (Petn. p. 12.) It is submitted that the harmless error question need not be reached as the evidence in question was admissible under Federal standards.

1. The Evidence Found Pursuant to a Lawful Inventory of a Vehicle Is Admissible Under Federal Standards

The facts of the first Miami arrest on April 5, 1968, are set forth in the opinion of the Court of Appeal on pages 10-12 and is here set forth:

> "The facts surrounding that arrest are summarized: while eating at a drive-in, Officer Chacon of the Miami Police Department informed Officer Estafan that defendant and Cornillot were taking pictures of their police cars from across the street; after eating, Estafan continued on routine patrol in his car, while Chacon remained; sometime later Chacon radioed that he was stopping defendant's car and requested backup assistance from Estafan;

on arrival at the scene Estafan heard Cornillot and defendant speaking loudly to Chacon; as he walked by defendant's car he observed a camera and a tape recorder in the car; Cornillot grabbed the officer and attempted to get between him and the car, apparently to prevent the officer from looking inside; Cornillot yelled at the officer that he had no right to search or look into the auto; Cornillot was placed under arrest for disturbing the peace (Fla. Stats. Ann., § 877.03) and for drunkenness (Fla. Stats. Ann., § 856.01); defendant began to take Estafan's picture, yelling that he had his rights and that he was a 'Cuban Power'; defendant was then arrested for disturbing the peace.

"An arrest by a police officer without a warrant is justified in Florida when the offense is committed in the presence of the officer. (Fla. Stats. Ann., § 901.15.) In view of the conduct of defendant and his companion, we hold that the arrests were based on probable cause. (*People v. Ingle*, 53 Cal. 2d 407, 412-413.) The fact that the charges against defendant were subsequently dismissed has no bearing on the legality of his arrest. (*Coverstone v. Davies*, 38 Cal. 2d 315, 319; *Fraher v. Superior Court*, 272 Cal. App. 2d 155, 161; *Smith v. State* (Fla.) 155 So.2d 826.)

"Officer Estafan of the Miami Police Department testified that when an arrest is made of the sole occupant of a car in Florida, 'the car becomes the responsibility of our department. . . . I'm responsible for the valuables of the car and of the car. . . . I make out a pound [*sic*] slip and inventory . . . all the items of value in the

car.' This was a procedure apparently authorized by statute. (See Fla. Stats. Ann., § 186.59.)[1] At the scene the officer made a cursory examination of the car; he observed a gun and shells in the glove compartment and bundles of printed material in the trunk. On instructions from the Intelligence Unit of the Miami Police Department, the car was then taken to police headquarters where a formal impound and inventory were made. A search of the trunk uncovered 60 packages, each containing 1,000 pamphlets entitled 'Declaration of Principles of Cuban Power, Cell No. 1, Gerrardo Torres Contreras,' approximately 75 red, white and blue placards depicting a person designated as Joe Marti, and 75 red, white and blue bumper stickers with a picture of Jose Marti and the words 'Poder Cubano.' Specimens of each of the above were retained by the police when they returned the auto and its contents to defendant; the specimens were introduced into evidence, being designated as Exhibits 80, 81 and 82, respectively."

[1] "See also California Vehicle Code sections 22651 and 22850."

The Court of Appeal, while holding the arrest to be valid, held the fruits of the inventory to be invalid on the basis of a California state case, *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 703-12, 94 Cal. Rptr. 412. *Mozzetti* held that items found in an inventory of an automobile that are not in plain sight are inadmissible. However, it is submitted that the *Mozzetti* test is not the Federal standard. *United States v. Edwards*, 441 F. 2d 749, 754 (5th Cir. 1971); *United States v. Boyd*, 436 F. 2d 1203, 1205 (5th Cir. 1971); *United States v. Lipscomb*, 435 F. 2d 795, 800-01 (5th Cir.

1970), *cert. denied*, 401 U.S. 980; *United States v. Robbins*, 424 F. 2d 57, 59 (6th Cir. 1970); *Cotton v. United States*, 371 F. 2d 385, 392-93 (9th Cir. 1967). This Honorable Court in *Cooper v. California*, 386 U.S. 58, 60-62, 17 L. Ed. 2d 730, held that in automobile forfeiture cases, the police may look through a vehicle, including the glove compartment to see what items are present. As the court stated in *Lipscomb*, on page 800,

> ". . . An inventory is then necessary both to preserve the property of the accused while he is in jail and to forestall the possiblity that the accused may later claim that some item has not been returned to him."

Since it appears that the fruits of a lawful inventory of a vehicle of items not in plain sight are admissible under Federal standards, the evidence taken from the vehicle at the first Miami arrest should be admitted into evidence under those standards. The harmless error rule would not be applicable.[1]

2. The Evidence Found in Petitioner's Apartment and Petitioner's Statements to Officer Cline on the Airplane Were Admissible

The Court of Appeal held that the arrest warrant and the arrest of petitioner on October 28, 1968 by FBI agents were valid, but that the search thereto was invalid. The court also held that petitioner's statements

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[1]It should be noted that the Court of Appeal, citing *Miller v. State, Fla.*, 137 So. 2d 21, 26, argues that fruits of an inventory are not admissible in Florida. However, *Miller* stands for the proposition that a search obviously not an inventory cannot be sustained as an inventory. In *Miller*, the court held that looking under a car floor mat could not reasonably be deemed an inventory to pfotect anything of value in the car. Actually it appears that items not in plain sight found in lawful inventories of vehicles are admissible in Florida. *Gaskins v. State*, Fla., 89 So. 2d 867, 869-70.

to Officer Cline on the plane were admissible. Petitioner argues that the arrest warrant was invalid and that petitioner's statements to Officer Cline on the airplane were inadmissible due to defective admonitions of rights. (Petn. pp. 26, 38.) It is submitted that the arrest and arrest warrant was valid, that the search was proper under Federal standards and that the statements of petitioner to Officer Cline were properly admissible.

a. *The Arrest Warrant Was Proper*

The facts relating to the arrest warrant for petitioner's arrest on October 28, 1968; and the affidavit thereto are set forth by the court on pages 14 and 15 of the Opinion, as follows:

> ". . . It appears that the FBI and the local authorities had conducted a joint investigation of the case. The facts developed caused each agency to consider defendant and Cornillot as prime suspects. In October, approximately three months after the bombings, Special Agent McCarthy, in charge of the case for the FBI, learned that the two men were in Florida and was aware of the intention of the FBI to obtain unlawful flight complaints against each. At about the same time Sergeant Cline, Los Angeles Police Department, secured from the district attorney's office a complaint against each man and warrants for their arrest. On October 28 Special Agent Karis, FBI, pursuant to instructions from his supervisor, signed a federal complaint against each man stating in his affidavit that he had been 'informed through official channels by the Los Angeles Police Department that felony complaints against the above two suspects are outstanding in Los Angeles County'

> for the July 19, 1968 offenses; that 'on or about July 20, 1968' each man 'did move and travel in interstate commerce . . . with intent to avoid prosecution . . .' (18 U.S.C.A., § 1073); and that he had been 'informed through official channels by FBI Miami that FBI agents have observed the subjects in Miami within the last several days.' Federal warrants were issued and served on defendant and Cornillot on October 28."

Petitioner first argues that the affidavit is defective under *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560. 28. L. 2d 306, 310, 311 and *Giordenello v. United States*, 357 U.S. 480, 486. 2 L. Ed. 2d 1503. (Petn. pp. 28-30.) However, in *Giordenello* and *Whiteley*, the affidavits contained only conclusory allegations that the suspect had committed a crime without any indication for the basis of the conclusion. In the affidavit in this case, the affiant related the source of his information and the facts he had learned therefrom. It was not conclusory as in the cases cited by petitioner, but instead was proper. See *Bowers v. Coiner*, 309 F. Supp. 1064, 1068. (U.S.D.C. S.D. West Virginia, 1970.)

Petitioner next contends that the affidavit is defective because the arrest was for flight to Miami to avoid prosecution in California in violation of 18 USC 1073, that 1073 was enacted to stop "roving criminals" and that he was not a "roving criminal" since he left California to go to Miami where he lived and voted. (Petn. pp. 30-31.) He also argues that the affidavit is defective in that the gravamen of 1073 is intent to avoid prosecution, which he argues is not adequately set forth in the affidavit. (Petn. pp. 30-31.) It is sub-

mitted that the affidavit was sufficient on its face and that the purpose of 1073 is consistent with the affidavit and the facts of the case. The purpose of 18 U.S.C. § 1073 is set forth in *United States v. Brandenburg*, 144 F. 2d 656, 659 (3rd Cir. 1944), and is as follows:

> "The purpose of the Fugitive Felon Act was stated by Congressman Sumners, Chairman of the Committee on the Judiciary of the House of Representatives, quoting the comments of the Attorney General of the United States on the bill as follows: 'One of the most difficult problems which local law-enforcement agencies have to deal with today is the ease with which criminals are able to flee from the State to avoid prosecution * * *. The above bill is considered the most satisfactory solution of this problem, which the States have never been able to solve effectively. This bill will not prevent the States from obtaining extradition of roving criminals, but the complicated process of extradition has proved to be very inefficient. The ability of Federal officers to follow a criminal from one State to any other State or States, as provided in the above bill, should furnish the desired relief from this class of law evaders. * * *' Report No. 1458 of the House Committee on the Judiciary, to accompany S. 2253, May 3, 1934, 73rd Congress, 2nd Session. The same report shows that the word 'burglary' and the other specific offenses named in the Act were substituted for the words 'a felony' used in the original bill. The general purpose of the Act was to assist in the enforcement of state laws. . . ."

The purpose of 1073 would therefore apply to petitioner, whether or not he lived in Miami. Whether or not the gravamen of 1073 is intent to avoid flight is irrelevant to the sufficiency of the affidavit, which indicated that felony complaints were issued against petitioner from Los Angeles County and that he was observed in Miami. For there to be probable cause in an affidavit, *prima facie* evidence of the crime need not be set out. *United States ex rel. Grano v. Anderson*, 318 F. Supp. 263, 266 (USDC, D. Delaware 1970); *Bowers v. Coiner*, 309 F. Supp. 1064, 1068. Therefore it is submitted that the affidavit to the arrest warrant was sufficient.

Petitioner also claims that the affidavit is defective because the affiant, Agent Karis stated in the above document that he was informed through official channels of the Los Angeles Police Department that felony complaints were outstanding against petitioner and Cornillot, when in fact he was so informed by official channels through his supervisor in the Federal Bureau of Investigation. [Petn. pp. 32-33; Rep. Tr. pp. 272-78.] Actually Agent Karis called his supervisor who told him that the information concerning the Los Angeles criminal complaint was true. [Rep. Tr. p. 272.] Therefore, Agent Karis did learn through official channels of the Los Angeles Police Department by means of his supervisor in the FBI that the felony complaint against petitioner existed in Los Angeles. The fact that is important is that Agent Karis received his information through official channels of a law enforcement agency so that the affidavit is true and not deficient.

In *McGrain v. Daugherty*, 273 U.S. 135, 156, 71 L. Ed. 580, this Honorable Court held a warrant for

attachment of a person ignoring a subpoena from a Senate committee, which is required to be under oath or affirmation, to be valid even though not sworn or affirmed thereto. Because it had the sanction of the oath of the members of the Senate. In the same manner, whether Agent Karis received his information through official channels personally by the Los Angeles Police Department or by means of another FBI agent would, it is submitted, be irrelevant and not really a misstatement.

Petitioner also argues that no complaint had been filed by the United States Attorney pursuant to section 1073 for at least two years in Southern California and that the charge against him was never prosecuted but was dismissed without further proceedings. (Petn. pp. 33-34.) However, as stated before, the purpose of 1073 is to aid local law enforcement agencies, which was accomplished by bringing petitioner back to Los Angeles for the purpose of trial. It is submitted that the relatively short absence of such complaints and the dismissal of these charges against petitioner do not show an absence of probable cause or any defect in the affidavit of the search warrant. Therefore, it is submitted that the search warrant was proper.

b. *The Search Pursuant to the Arrest for Flight to Avoid Prosecution Was Proper Under Federal Standards*

It is submitted that the search pursuant to the arrest warrant was proper and that the evidence gleaned thereby was properly admissible under Federal standards. The search took place on October 28, 1968, before this Court's decision in *Chimel v. California*, 395

U.S. 752, 23 L. Ed. 2d 685, so that that particular decision is inapplicable. *Williams v: United States,* 401 U.S. 646, 28 L.Ed. 2d 388. The Court of Appeal held that the search was invalid in that it was not related to the crime for which appellant was being arrested, namely, flight from prosecution from one state to another. The Court of Appeal based its decision upon the California case of *People v. Baca,* 254 Cal. App. 2d 428, 430, 62 Cal. Rptr. 182, which case invalidated a search based on an arrest on the basis of a bench warrant, since the finding of the suspect was sufficient evidence of the crime so that no further evidence was needed.

However; in the case at bar, the gravamen of the offense was flight from California to Florida to escape prosecution. Therefore, the authorities, upon arresting petitioner, were under a duty to seach for evidence, showing interstate flight and the means of interstate flight, such as airline tickets or other objects showing flight. *See United States v. Stern,* 225 F. Supp. 187, 190 (U.S.D.C., S.D. *New York,* 1964); *United States v. Lord,* 184 F. Supp. 923, 926 (U.S.D.C., S.D. New York, 1960). The authorities could also search for evidence relating to the crime for which he was charged in Los Angeles to show that he was hiding evidence and fearful of a strong case against him in California as motive for the flight. Therefore, it is submitted that the items found during the search were admissible into evidence under Federal standards.

c. *Statements Made by Appellant to Sergeant Cline on the Airplane from Florida to California Were Properly Admitted Into Evidence*

Petitioner argues that statements made by himself to Officer Cline should not have been admitted into evidence because they resulted from what he characterizes as an illegal arrest of October 28, 1968, by reason of the defects as he alleges exist in the affidavit to the search warrant. (Petn. p. 38.) However, it is submitted that the arrest was proper and the arrest warrant was proper as previously argued, so that the statements were properly introduced into evidence.[2]

Petitioner, without argument, states that the statements were inadmissible ". . . by reason of the lack of proper admonition of his rights under the Escobedo (Escobedo v. Illinois, 378 U.S. 478) and Miranda (Miranda v. Arizona, 384 U.S. 436) rules." (Petn. pp. 5, 38.)

However, the record shows that on December 21, 1968, Sergeant Cline advised petitioner of his constitutional rights pursuant to *Miranda* at the Dade County, Florida, jail which petitioner said that he understood. [Rep. Tr. pp. 333-35.] Petitioner appeared to be able to speak and understand English. [Rep. Tr. p. 334.] There was no interrogation at that time. The conversations in question were made within two hours of the time on the plane. [Rep. Tr. p. 335.] It is submitted

[2]It is submitted, however, that if for the sake of argument only the arrest was illegal, it did not taint the admission of these statements. Petitioner was arrested on October 28 and did not speak to Sergeant Cline until December 21. (Opinion pp. 5-6.)

that the fact that petitioner had been warned of his rights within two hours of making the statement, which he admitted he understood, would be sufficient admonition of rights. *See People v. Bynum*, 4 Cal. 3d 589, 600, 94 Cal. Rptr. 241; *People v. Hill*, 66 Cal. 2d 536, 544, 58 Cal. Rptr. 340, *cert. denied* 389 U.S. 993; *People v. Cooper*, 10 Cal. App. 3d 96, 107, 88 Cal. Rptr. 919; *People v. Brockman*, 2 Cal. App. 3d 1002, 1006, 83 Cal. Rptr. 70; *People v. Stewart*, 264 Cal. App. 2d 809, 815, 70 Cal. Rptr. 873.

Also it should be noted that petitioner's statements were not elicited by interrogation, but resulted from mere idle conversation. [Rep. Tr. p. 336.]

Therefore, petitioner was advised of his constitutional rights within two hours of the statements being made and these statements were not a product of interrogation, but rather that of idle conversation between the parties. It is submitted, therefore, that the statements were properly introduced into evidence.

B. If, for the Sake of Argument Only, the Evidence Gleaned From the Miami Inventory and Search Was Inadmissible, It Was Harmless Error

Petitioner argues that the Court in holding the evidence gleaned from the Miami inventory and search were inadmissible, improperly held it to be harmless error under *Chapman v. California*, 386 U.S. 18, 23, 17 L. Ed. 2d 705. (Petn. p. 12.) As argued previously, it is submitted that the product from Miami was properly reduced into evidence; but if, for the sake of

argument only, it was error, the error was harmless and did not contribute to the verdict beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250, 254, 23 L. Ed. 2d 284. The items seized were merely pamphlets and documents dealing with Cuban patriotism and anti-Castroism and anti-Castro organizations, which petitioner never disputed was part of his philosophy. (Opinion pp. 5-9, 11, 12.) Even petitioner admits that this evidence was merely to show petitioner's involvement in the "Cuban Power" movement. (Petn. p. 15.) In fact, petitioner had been seen, in evidence other than that gleaned in the searches, carrying boxes that had on it stickers reading, "Cuban Power." (Opinion pp. 4-5.) Petitioner also showed his zeal for the "Cuban Power" movement in conversation with Sergeant Cline. (Opinion p. 7.) The fact that the prosecutor mentioned and used this evidence at trial and the fact that the Deputy Attorney General who prepared the response in the State Appellate Court referred to this evidence, would not show it was not harmless as petitioner argues. (Petn. pp. 13-14.) Petitioner's argument would mean that anytime a prosecutor sought or used evidence found to be improper, it could never be harmless. Since the evidence related only to undisputed fact, it was harmless beyond a reasonable doubt. However, it is strongly urged that under Federal standards, the evidence from the Miami inventory and search was properly introduced into evidence.

II.

SUFFICIENCY OF THE EVIDENCE IS A QUESTION FOR THE TRIER OF FACT

Petitioner argues that absent the evidence obtained from the Miami inventory and search, the evidence is insufficient to sustain the conviction. (Petn. pp. 34, 35.) Sufficiency of the evidence is a question of fact for the jury, and it should not be reweighed by an appellate court, so that a Federal question is not involved: *Hoke v. United States*, 227 U.S. 308, 324:

However, it is submitted that the evidence is sufficient even absent the Miami evidence, though it is urged, as previously argued, that the material gleaned from Miami was properly introduced into evidence. That the evidence is sufficient is brought out by the Court of Appeal in the Opinion on pages 20 and 21:

> "The evidence that the bombings were all perpetrated by members of the 'Cuban Power' organization is strong. There is evidence that the organization was engaged in anti-Castro activities. Defendant admitted membership therein. We recognize that mere membership in a subversive group would be insufficient to sustain a conviction of a crime committed by some members thereof (*Keyishian v. Board of Regents of New York*, 385 U.S. 589 [17 L.Ed.2d 629, 642-643, 87 U.S. 675], but here we have significant additional evidence: defendant's presence in Los Angeles at about the time of the bombings; the fact that he and one Arnau picked up similar stickers at a Los Angeles printing establishment on June 28, 1968; evidence that in May or June of 1968 defendant

and codefendant Cornillot were seen taking cardboard boxes with 'Cuban Power' stickers on them into the Los Angeles apartment of a Mr. Padron, a survivor of the Bay of Pigs invasion; evidence that the bombs had been housed in cardboard boxes; evidence that codefendant's fingerprints were found on a 'Cuban Power' sticker on the wall of the Mexican National Tourist Council office immediately after the bombings, and defendant's fingerprints were found on a similar sticker on a pillar on the Air France office immediately after the bombings; in addition, there is defendant's voluntary statement to a police officer during his transportation from Miami to Los Angeles: 'What do you think I'll get? . . . We are patriots and we believe in what we are doing. . . . We are fighting on foreign soil just as you are in Vietnam.'

"There is substantial evidence (*People v. Bassett*, 69 Cal. 2d 122, 139), not only of his membership in the 'Cuban Power' organization, but of his conspiracy with other members thereof to commit criminal acts (Pen. Code, § 31; *People v. Hardeman*, 244 Cal.App.2d 1, 41), and also of his commission of the crimes of which he was convicted."

United States v. Corso, 439 F. 2d 956, 961 (4th Cir. 1971), cited by petitioner (Petn. pp. 36-37) is not in point as the evidence in that case, a Federal prosecution of a burglary of a savings and loan company, comprised the defendant's fingerprints on a moveable item found at the scene of the crime and the fact that the defendant had worked a year before in

an adjacent building. The facts in the case at bar are much stronger.

Petitioner argues that certain statements made by him to Sergeant Cline asking the officer as to what the officer thought he would get and that they were patriots believing in what they were doing and fighting on foreign soil just as "you are in Vietnam," were taken out of context in that they could be interpreted in an innocent manner. Namely he argues that it could merely reflect anti-communist feeling and fear of being convicted, "even though innocent." (Petn. p. 38.) It is submitted that inferences as to statements whether of innocence or guilt are for the trier of fact, and is not subject to attack on appeal. *See People v. Hillery*, 62 Cal. 2d 692, 702-03, 44 Cal. Rptr. 30, 401 P. 2d 382, *cert. denied*, 386 U.S. 938; *People v. Daugherty*, 40 Cal. 2d 876, 884-85; 256 P. 2d 911; *People v. Newland*, 15 Cal. 2d 678, 681, 104 P. 2d 778.

Petitioner also argues that the Court of Appeal stated in its Opinion that there was evidence that bombs of the same type were used in both Miami and Los Angeles explosions (Opinion p. 20) when no such evidence was introduced. (Petn. p. 38.) However, petitioner himself testified that Cuban Power was claiming credit along with other organizations, for bombings that were taking place in Miami. [Rep. Tr. pp. 565-576.]

It is submitted therefore that the question of sufficiency of the evidence is not a Federal question, and also that in fact, the evidence was sufficient to sustain the conviction, even without the evidence obtained from Miami.

Conclusion

For the foregoing reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeal

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

The People, Plaintiff and Respondent, v. Juan Jorge Garcia Cardenas,* Defendant and Appellant. 2 Crim. No. 18297. (Sup. Ct. No. 236683).

Filed: July 28, 1971.

APPEAL from judgment of the Superior Court of Los Angeles County and order denying probation. Paul G. Breckenridge, Judge. Judgment affirmed; appeal from order dismissed.

Edward I. Gritz, for Defendant and Appellant.

Evelle J. Younger, Attorney General, William E. James, Assistant Attorney General, and Norman N. Flette, Deputy Attorney General, for plaintiff and Respondent. [End of Page 1]

Defendant and codefendant Cornillot were jointly indicted on fifteen felony counts in connection with bombings on July 19, 1968 of five separate buildings and offices in Los Angeles and Beverly Hills. Cornillot was not tried with defendant.[1] Counts 1, 4, 7, 10 and

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*The record on appeal alternately describes defendant as Garcia, Cardenas and Garcia-Cardenas. The indictment was amended June 18, 1969 to show defendant's true name as Juan Jorge Garcia Cardenas.

[1]The clerk's transcript prepared in conjunction with Cardenas' appeal does not contain copies of all the counts of which he was found guilty; some of the counts were amended and do not correspond to the counts as stated in the judgment. We have augmented the record to include the Superior Court file (Cal. Rules of Court, rule 12a) and find that the indictment set forth in defendant's record on appeal in fact applies to Cornillot.

(This footnote is continued on next page)

13 charged defendant with unlawfully discharging explosives (Pen. Code, § 375(4)); counts 2, 5, 8; 11 and 14 with possession of destructive devices (Pen. Code, § 12303); and counts 3, 6, 9, 12 and 15 with malicious use of explosives (Health & Saf. Code, § 12354). Defendant pleaded not guilty. Motions under sections 995 and 1538.5, Penal Code, and a motion to suppress Exhibits 80, 81 and 82 were denied.

After jury trial defendant was found guilty on all counts; his motion for new trial and application for probation were denied. The court, on its own motion arrested judgment on the counts of malicious use of explosives (counts 3, 6, 9, [End of Page 2] 12 and 15), and defendant was "discharged from further disabilities on those counts." He was sentenced to state prison for the term prescribed by law on the five bombing and the five possession counts, the sentence on the bombing of the Shell Data Processing Center (count 4) to run consecutively to the sentence on the bombing of the Mexican National Tourist Council (count 1), and the sentences on the other three bombing counts (counts 7, 10 and 13) to run concurrently with that on count 1; execution of sentences was stayed on the possession counts (counts 2, 5, 8, 11 and 14) until the judgment becomes final on the bombing counts, at which time the stay was to become permanent. Defendant appeals from the judgment of conviction and the order denying probation; the appeal from the order will be dismissed. (Pen. Code, § 1237; *People v. Jackson*, 230 Cal.App.2d 485, 489.)

We perceive no purpose in having the clerk's transcript corrected since the reporter's transcript at pages 17 through 32 states the full text of all the courts charged against Cardenas and of which he was found guilty; the judgment conforms thereto.

Facts

On April 5, 1968 defendant and codefendant Cornillot were arrested in Miami, Florida, for disturbing the peace. Defendant's car was driven to the police station, impounded, searched, and the contents thereof inventoried. The charges against the two men were subsequently dismissed. Defendant's automobile was returned to him. At the time he was unaware that the police had retained possession of some of the contents of his car. [End of Page 3]

Shortly after midnight on July 19, 1968, five buildings in Los Angeles and Beverly Hills were bombed: the Mexican National Tourist Council (count 1) in Beverly Hills; the Shell Data Processing Center (count 2), approximately 50 yards distant from the tourist agency; the Air France office (count 7) in downtown Los Angeles; the Japan Air Lines office (count 10) approximately a block and a half west of Air France; and the Government of Mexico Tourist Department (count 13), midway between Los Angeles and Beverly Hills. Stickers with the words "Unete Poder Cubano" (United Cuban Power) were found at the bombed buildings: at the Mexican Tourist Council (Exhibit 66), at the Air France office (Exhibit 64 and Exhibit 67), and at the Shell Center (Exhibit 65).

It was stipulated at trial "that the stickers . . . marked . . . 64, 65, 66 and 67 were ordered from [Colby Poster Printing Company in Los Angeles] on May 25, 1968 by Pedro . . . Arnau . . . .; that the stickers were ordered in the quantity of 1,000, and that the stickers were picked up on June 26, 1968, by Pedro Arnau and Juan Garcia-Cardenas, the defendant. . . ."

A Mrs. Bustamente testified that prior to June or July 1968 she had observed defendant and codefendant [End of Page 4] Cornillot on numerous occasions carrying cardboard boxes into one Adolfo Padron's apartment and saw stickers on the boxes reading "Cuban Power."

A fingerprint expert testified that he found Cornillot's fingerprints on a sticker at the Mexican National Tourist Council office (Exhibit 66), and defendant's fingerprints on a sticker at the Air France office (Exhibit 67).

A criminologist assigned to the Scientific Investigation Division, Los Angeles Police Department, investigated the various bombed locations. He testified that analysis of the debris found at each location indicated that homemade bombs from a common source had been used; that he found fragmentary evidence of red, white and blue material with foreign language thereon which had been placed and wrapped with a type of masking tape; that the bombs had been constructed with flat powder fuses containing red thread; that the main charge had been dynamite; and that the bombs had been placed in mail boxes or positioned near doors.

On October 28, 1968, upon receipt of information via radio that a fugitive warrant had been issued in Los Angeles for the arrest of defendant, FBI agents arrested defendant in Miami. Without his consent they searched his apartment and found red, white and blue stickers with the words "Poder [End of Page 5] Cubano" and the printed name "Jose Marti" (Exhibit 85).

a three-page handwritten[2] document entitled "Poder Cubano Unido, Celula, Espontanea #1 GTC" (Exhibit 86[2]), two receipts for donations (Exhibit 87), a three page typed document entitled "Poder Cubano Tribuno Del Partido Revolucionario de Cubano" (Exhibit 88), a document entitled "Boletin de Guerre" (War Bulletin) (Exhibit 89[3]), and a document entitled "Poder Cubano Celula #1, Gerardo Torres Contreras" (Exhibit 90[4]).

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[2]Exhibit 86 reads in pertinent part as follows:

"United Cuban Power.
"Spontaneous Cell #1 G.T.C.

. . .

"Through this medium we inform the exiles in general, that all secret spontaneous cells that operate in different cities of the U.S. close ranks . . . not to criticize any medium used in the battle for the prompt overthrow of the existing regime in Cuba.

". . . The only thing that will carry us to victory will be the Cuban revolution. . . .

"For the liberty of Cuba we call the Cubans to incorporate in the battle—this is the time where we have to maintain high our combat flag at whatever price that may be necessary. . . .

"Every Cuban has the duty of trying by all means within his reach to cooperate in the liberation of our country.

. . .

"And that's why we say that we will maintain our position in any place where we may be, attacking the enemies of our country that trade with the blood and sorrow of our Cuba. . . .

"If we want to criticize or judge, we should first fight to free our country. . . ."

[3]Exhibit 89 reads in part:

"We are responsible of the revolutionary punishment against the French offices, and we ask the French Government to break its treacherous commerce with the Castro communism."

[4]Exhibit 90 reads in part:

"Cuban Power.
"Cell #1. Gerardo Torres Contreras:

. . .

(This footnote is continued on next page)

On December 21, 1968 Sergeant Cline of the Los Angeles Police Department, who had gone to Miami to transport defendant to Los Angeles, advised him of his constitutional rights. Within two hours thereafter, defendant and the officer engaged [End of page 6] in a short conversation while airborne en route to Los Angeles. The officer asked defendant if he was aware that a Dr. Bosch had received five to ten years for terroristic activities; defendant replied: "Yes. What do you think I'll get?" Defendant added: "We are patriots and we believe in what we are doing. . . . We are fighting on a foreign soil just as you are in Vietnam.".

Defendant testified that he was 31 years old, and he had been born in Cuba, and spoke and understood some English; that at the time of the bombings he was a member of a movement known as "Poder Cubano" (Cuban Power), and assisted in the propagation of its principles by distributing pamphlets, [End of page 7] literature and stickers; that he lived in Miami, where he operated a restaurant, and on occasions had gone to Los Angeles to visit relatives and to assist Los Angeles members of the Cuban movement; that he had assisted Pedro Arnau in picking up stickers at a Los Angeles printing plant; that he did not carry any boxes into Mr. Padron's apartment; that he had not met co-defendant Cornillot in Los Angeles by prearrangement, but had seen him several times on the street during June 1968; that he was aware that Arnau and

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"Third: Encourage the militancy of those exiled for their participation of every type of struggle. . . .

. . .

"Ninth: Encourage actions in the world of the Cuban revolutionaries, to blockage commerce with tyranny. . . .

"Miami, September 24, 1968.

"Dr. Orlando Bosch, Political Delegate Cuban Power."

Padron were survivors of the Bay of Pigs incident and were members of "Poder Cubano"; that he believed that the only way to [End of page 8] overthrow Castro was by the use of revolutionary means; that the inherent plan of "Poder Cubano" to accomplish this result was to prevent foreign countries from trading with Cuba, thus bringing about Cuba's economic destruction, that he had written the full text of Exhibit 86 (see fn. 2, *ante*); that he was in Miami on the day of the bombings, having returned from Los Angeles by automobile during the latter part of June or early July 1968; and he was not aware until his trial in Los Angeles that the Miami police had secretly retained articles taken from his car on the occasion of his April 1968 arrest on the charge of disturbing the peace.

Contentions

Defendant contends that each of his arrests in Miami was unlawful and that the searches and seizures incidental thereto were illegal; that his statements to the Los Angeles police officer were obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 [16 L. Ed.2d 694; 86 S.Ct. 1602]; that the federal fugitive warrant was obtained improperly by federal agents, was a mere subterfuge to deprive him of extradition rights and to subject his apartment to an exploratory search; that the trial judge erred prejudicially in giving instructions on conspiracy; and that the evidence was insufficient to sustain the judgment of his conviction. [End of page 9]

First Miami Arrest

Defendant contends the Miami police had no probable cause to arrest him on April 5, 1968 for disturbing the peace; that the search of his car which uncovered Exhibits 80, 81 and 82 was illegal and that the exhibits were improperly admitted into evidence at his trial in Los Angeles. He also suggests that lack of probable cause is amply demonstrated by the fact that the charge for which he was arrested was subsequently dismissed.

The facts surrounding that arrest are summarized; while eating at a drive-in, Officer Chacon of the Miami Police Department informed Officer Estafan that defendant and Cornillot were taking pictures of their police cars from across the street; after eating, Estafan continued on routine patrol in his car, while Chacon remained; sometime later Chacon radioed that he was stopping defendant's car and requested backup assistance from Estafan; on arrival at the scene Estafan heard Cornillot and defendant speaking loudly to Chacon; as he walked by defendant's car he observed a camera and a tape recorder in the car; Cornillot grabbed the officer and attempted to get between him and the car, apparently to prevent the officer from looking inside; Cornillot yelled at the officer that he had no right to search or look into the [End of page 10] auto; Cornillot was placed under arrest for disturbing the peace (Fla. Stats. Ann., § 877.03) and for drunkenness (Fla. Stats. Ann., § 856.01; defendant began to take Estafan's picture, yelling that he had his rights and that he was a "Cuban Power"; defendant was then arrested for disturbing the peace.

An arrest by a police officer without a warrant is justified in Florida when the offense is committed in

the presence of the officer. (Fla. Stats. Ann., § 901.15.) In view of the conduct of defendant and his companion, we hold that the arrests were based on probable cause. (*People v. Ingle*, 53 Cal.2d 407, 412-413.) The fact that the charges against defendant were subsequently dismissed has no bearing on the legality of his arrest. (*Coverstone v. Davies*, 38 Cal.2d 315, 319; *Fraher v. Superior Court*, 272 Cal. App.2d 155, 161; *Smith v. State* (Fla.) 155 So.2d 826.)

Officer Estafan of the Miami Police Department testified that when an arrest is made of the sole occupant of a car in Florida, "the car becomes the responsibility of our department. . . . I'm responsible for the valuables of the car and of the car. . . . I make out a pound [*sic*] slip and inventory . . . all the items of value in the car." This was a procedure apparently authorized by statute. (See Fla. Stats. Ann., § 186.59.) At the scene the officer made [End of page 11] a cursory examination of the car; he observed a gun and shells in the glove compartment and bundles of printed material in the truck. On instructions from the Intelligence Unit of the Miami Police Department, the car was then taken to police headquarters where a formal impound and inventory were made. A search of the trunk uncovered 60 packages, each containing 1,000 pamphlets entitled "Declaration of Principles of Cuban Power, Cell No. 1, Gerrardo Torres Contreras," approximately 75 red, white and blue placards depicting a person designated as Jose Marti, and 75 red, white and blue bumper stickers with a picture of Jose Marti and the words "Poder Cubano." Specimens of each of the above were retained by the police when they returned the auto and its contents to defendant;

the specimens were introduced into evidence, being designated as Exhibits 80, 81 and 82, respectively.

Defendant contends that the impound was a pretext for an illegal search and that the fruits thereof, Exhibits 80, 81 and 82, were inadmissible. The People argue that an inventory search of an impounded auto was legal as of the date of the instant search (April 1968), and that the subsequent decision restricting such searches (*Mozzetti v. Superior Court*, 4 Cal.3d 699) should not be applied retroactively.

We have no hesitancy in holding that *Mozzetti* is applicable to this case. *Mozzetti* restates a principle first [End of Page 12] enunciated in 1964, the Supreme Court stating on page 711: "In *People v. Burke* (1964) *supra*, 61 Cal. 2d 575, the police had lawful custody of the automobile of a suspect arrested on suspicion of burglary. Nevertheless, this court invalidated a search of the vehicle at the police storage lot. We explicitly rejected the People's contention that the authority to remove and store the vehicle under Vehicle Code sections 22651, subdivision (h), and 22850 encompassed authority to search: 'The officers were authorized by these sections to remove defendant's car from the highway and impound it but the sections do not purport to authorize the making of a search.' (*Id.* at p. 580.)"

We hold that the product of the search of defendant's auto was inadmissible under California law. Although questions of admissibility of evidence are decided by the law of the forum (11 Cal.Jur.2d, Conflict of Laws, § 97, p. 201; Rest., Conflict of Laws, § 597), we note that as of the date of the search, evidence obtained under such circumstances was also inadmissi-

ble in Florida. (*Miller v. State* (Fla.) 137 So.2d 21, 26.) Exhibits 80, 81 and 82 were improperly admitted into evidence. In view of this conclusion we find it unnecessary to discuss other contentions raised by defendant with respect to the admissibility of these three exhibits, namely: that the search was remote from the [End of Page 13] place of arrest; that the search was at a different location than the usual place for making an inventory; and that the nonconsensual retention by the Miami police of the three specimens made the exhibits inadmissible.

Second Miami Arrest

Defendant contends that his arrest on October 28, 1968 by FBI agents was based on an improperly issued federal warrant; alternately, that if his arrest was proper, the search exceeded the scope of the crime for which he was arrested and was likewise illegal; and that the federal action was an unwarranted interference with state extradition proceedings and a pretext for an exploratory search.

We first consider the legality of defendant's arrest. It appears that the FBI and the local authorities had conducted a joint investigation of the case. The facts developed caused each agency to consider defendant and Cornillot as prime suspects. In October, approximately three months after the bombings, Special Agent McCarthy, in charge of the case for the FBI, learned that the two men were in Florida and was aware of the intention of the FBI to obtain unlawful flight complaints against each. At about the same time Sergeant Cline, Los Angeles Police Department, secured from the district attorney's office a complaint against each

man and warrants for their arrest. On October 28 Special [End of Page 14] Agent Karis, FBI, pursuant to instructions from his supervisor, signed a federal complaint against each man, stating in his affidavit that he had been "informed through official channels by the Los Angeles Police Department that felony complaints against the above two suspects are outstanding in Los Angeles County" for the July 19, 1968 offenses; that "on or about July 20, 1968" each man "did move and travel in interstate commerce . . . with intent to avoid prosecution . . ." (18 U.S.C.A., § 1073); and that he had been "informed through official channels by FBI Miami that FBI agents have observed the subjects in Miami within the last several days." Federal warrants were issued and served on defendant and Cornillot on October 28.

Relying on *Giordenello v. United States*, 357 U.S. 480 [2 L.Ed.2d 1503, 78 S.Ct. 1245].) defendant contends that the affidavit to the federal complaint was deficient in that it failed to set forth essential facts constituting the offense charged and in that it failed to show probable cause to believe that the offense had been committed and that defendant had committed it; and that as a result his arrest was illegal.

The affidavit in *Giordenello* set forth no facts, but only the conclusion that on a particular day the defendant possessed narcotics in violation of a federal law. In holding that it was defective and that the resultant arrest was illegal, the Supreme Court said: "The Complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does [End of Page 15] not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which

a finding of probable cause could be made." (357 U.S. at p. 486 [2 L.Ed.2d at pp. 1509-1510].)

Giordenello is readily distinguishable. Here we have an affidavit setting forth facts and the source thereof. (See *Bowers v. Coiner* (S.D. W.Va. 1970) 309 F. Supp. 1964.) The affidavit was sufficient and the arrest was legal.

We next consider the legality of the search of defendant's apartment and seizure of evidence. The search occurred prior to *Chimel v. California,* 395 U.S. 752 [23 L.Ed.2d 685, 697, 89 S.Ct. 2034], and its legality is determined by pre-*Chimel* standards. (*People v. Edwards,* 71 Cal.2d 1096, 1107.) It has been repeatedly stated that where an arrest is lawful, a reasonable search incidental thereto is valid. (*Ker v. California,* 374 U.S. 23 [10 L.Ed.2d 726, 742-744, 83 S.Ct. 1623]; *People v. Cockrell,* 63 Cal.2d 659, 667.) In order to be incident to an arrest the search must be limited to the premises where the arrest is made, have a definite object and be reasonable in scope. (*Cockrell, supra,* 63 Cal.2d at p. 667.) The scope of a search is unreasonable when the purpose of it is to uncover evidence unrelated to the crime for which the arrest is made; and evidence recovered as a result thereof is inadmissible. (*People v. Schaumloffel,* 53 Cal.2d 96.) Thus it was [End of Page 16.] held in *People v. Baca,* 254 Cal.App.2d 428, that contraband found during a search of defendant's home following her arrest on a bench warrant was inadmissible, the court pointing out on page 431 that defendant was arrested as a fugitive, that once the police had discovered her, their purpose had been fulfilled and that "[t]here was no need to search further once the object of the search had been found."

The principles of *Baca, supra,* apply here. Defendant was not arrested on the state charges or under the state warrant; the arrest was made on the federal warrant issued in connection with the federal charge of flight to avoid prosecution. The search and seizure was illegal; Exhibits 85-91 (fns. 2, 3, 4, *ante*) were improperly received in evidence.

It appears that at the time of defendant's arrest he was warned of his *Miranda* rights by an FBI agent. During the search of his apartment one of the agents asked defendant if the handwritten document, Exhibit 86 (fn. 2, *ante*), was in his handwriting; defendant acknowledged that it was.

At trial defendant was asked on cross-examination about Exhibit 89 (fn. 3, *ante*). He admitted that he wrote it in September or October 1968.

Since we have held that Exhibits 86 and 89 were the product of an illegal search and seizure, and were improperly [End of Page 17] received in evidence, it necessarily follows that his statement with respect to Exhibit 86 and his testimony with respect to Exhibit 89 were not admissible.

Statement to
Los Angeles Police Officer

Defendant contends that the following statement admitted into evidence violated rights guaranteed by *Miranda:* "We are all patriots and we believe in what we are doing. We are fighting on a foreign soil just as you are in Vietnam."

There is no merit to this contention. It was made by defendant to Sergeant Cline of the Los Angeles Police Department, during travel to Los Angeles, after de-

fendant had been adequately warned of his *Miranda* rights. Furthermore, the record clearly shows and defendant admitted that at the time of the statement, Cline was not conducting any interrogation of him, but that the statement was made voluntarily during "idle conversation."

Instructions on Conspiracy

Defendant contends that since he was not charged with conspiracy, the trial court erred in instructing the jury on conspiracy.

We do not agree. As stated in *People v. Washington*, 71 Cal.2d 1170, 1174: "When there is evidence of a conspiracy to commit the substantive offenses charged, it is not error [End of Page 18] to instruct the jury on the law of conspiracy even though no conspiracy is charged. [Citations.]" (Cf. *People v. Fain*, 18 Cal. App.3d 137, 143.) Here there was substantial evidence of a conspiracy, and the prosecution used it to prove the guilt of the substantive offenses.

Sufficiency of the Evidence

Disregarding Exhibits 80-82 and 85-91, obtained in the two Miami searches, and defendant's admission that Exhibits 86 and 89 were in his handwriting, all of which evidence we have held to have been inadmissible, we review the remaining evidence to determine its sufficiency to sustain the verdict. In doing so we are governed by principles set forth in *People v. Redmond*, 71 Cal.2d 745, 755: "This court must review the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Sweeney*, 55 Cal.2d 27, 33 [9 Cal.

Rptr. 793, 357 P.2d 1049].) If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Robillard*, 55 Cal.2d 88, 93 [10 Cal.Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]; *People v. Love*, 53 Cal.2d 843, 850-851 [3 Cal.Rptr. 665, 350 P. 2d 705].) The test on appeal is [End of Page 19] whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. (*People v. Hillery*, 62 Cal.2d 692, 702-703 [44 Cal.Rptr. 30, 401 P.2d 382].) Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it."

Here we find bombs of the same type used in Miami and in Los Angeles explosions, "Cuban Power" wrappers on the bombs and "Cuban Power" stickers found at several of the bomb sites. The evidence that the bombings were all perpetrated by members of the "Cuban Power" organization is strong. There is evidence that the organization was engaged in anti-Castro activities. Defendant admitted membership therein. We recognize that mere membership in a subversive group would be insufficient to sustain a conviction of a crime committed by some members thereof (*Keyishian v. Board of Regents of New York*, 385 U.S. 589 [17 L.Ed.2d 629, 642-643, 87 U.S. 675], but here we

have significant additional evidence: defendant's presence in Los Angeles at about the time of the bombings; the fact that he and one Arnau picked up similar stickers at a Los Angeles printing establishment on June 28, 1968; evidence that in May or June of 1968 defendant and codefendant Cornillot were seen taking cardboard boxes with "Cuban Power" [End of Page 20] stickers on them into the Los Angeles apartment of a Mr. Padron, a survivor of the Bay of Pigs invasion; evidence that the bombs had been housed in cardboard boxes; evidence that codefendant's fingerprints were found on a "Cuban Power" sticker on the wall of the Mexican National Tourist Council office immediately after the bombings, and defendant's fingerprints were found on a similar sticker on a pillar at the Air France office immediately after the bombings; in addition, there is defendant's voluntary statement to a police officer during his transportation from Miami to Los Angeles: "What do you think I'll get? . . . We are patriots and we believe in what we are doing. . . . We are fighting on foreign soil just as you are in Vietnam."

There is substantial evidence (*People v. Bassett*, 69 Cal.2d 122, 139), not only of his membership in the "Cuban Power" organization, but of his conspiracy with other members thereof to commit criminal acts (Pen. Code, § 31; *People v. Hardeman*, 244 Cal.App.2d 1, 41), and also of his commission of the crimes of which he was convicted.

The evidence of guilt is so strong that we unhesitantly conclude beyond a reasonable doubt that the

errors in the admission of evidence did not contribute to the verdict obtained (*Chapman v. California,* 386 U.S. 18, 24 [17 L.Ed.2d 705, 710, 87 S.Ct. 824]), and that it is not reasonably [End of Page 21] probable that a result more favorable to the defendant would have been reached in the absence of the errors. (*People v. Watson,* 46 Cal.2d 818, 836.) The errors were not prejudicial; they did not result in a miscarriage of justice; they did not deprive defendant of a fair trial. (Cal. Const., art. VI, § 13.)

Judgment affirmed; appeal from order denying probation dismissed.

CERTIFIED FOR NONPUBLICATION.

Schweitzer, *J.*

We concur:

Ford, *P. J.*

Allport, *J.* [End of Page 22]